82-2077

No. ....

In the Supreme Court of the United States

OCTOBER TERM, 1982

CLAIR OLSEN and GUITAR CITY STUDIOS, INC.,
a Utah corporation,
Petitioners,

vs.

PROGRESSIVE MUSIC SUPPLY, INC., NORLIN MUSIC, INC., formerly CHICAGO MUSICAL INSTRUMENTS, and PEAVEY ELECTRONICS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a plaintiff who has submitted substantial evidence on the anti-competitive affect of the defendants conduct as an exception to the manufacturer's normal distribution system coexisting with a proven illegal conspiracy entitled to have the defendants answer his evidence or should defendants be allowed to avoid responding by virture of a 41(b) Motion?

2. Is unfair competition actionable under the antitrust laws as an inseparable part of the federal question of conspiracy when it was in furtherance of per se

illegal combination, and is the trial court required to make findings of facts on the issues of unfair competition and award separate damages for the injuries suffered or can such issues be dismissed in silence?

3. Is a plaintiff who has presented a reasonable damage theory supported by expert testimony and demonstratable economic evidence entitled to receive that measure of his damages or can the damages be reduced by admitted speculation?

4. Will a private litigants proof of a violation of Section I of the Sherman Act merge with claims of Section II violations, or is it proper to dismiss the Section II claims by separating the evidence of the proven Section I violations when considering Section II claims?

DESIGATION OF CORPORATE RELATIONSHIPS

The Guitar City Studios, Inc. filing this petition for Writ of Certiorari to the Tenth Circuit Court states that:

1. This is its original designation of corporation;

2. Guitar City Studios, Inc. is not owned by any present corporation;

3. Guitar City Studios, Inc. does not have an ownership interest in any subsidiaries;

4. Guitar City Studios, Inc. does not have any affiliates.

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To the Honorable Warren Burger, Chief Justice of the Supreme Court and the Honorable Justices of the Supreme Court of the United States.

The above-named petitioners respectfully pray that a Writ of Certiorari be issued to review the judgment in the United States Court of Appeals for the Tenth Circuit entered in the above-entitled cause affirming the judgment of the United States District Court for the District of Utah, which was entered in said Court of Appeals in Case No. 82-1357 and 82-1400 on March 8, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals that was entered on March 8, 1983, is unreported at the date of the printing of this petition, but is reproduced in Appendix A. The opinion of the United States District Court for the District of Utah is reported at 1982-2 Trade Cases 64,928 (D. Utah, 1981) and is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court was entered on March 8, 1983, and has not been reported as of the date of the printing of this petition. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). On June 3, 1983, time for filing was extended to June 29, 1983 (A-968).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This petition involves the following constitutional provisions, statutes and Federal Rules of Civil Procedure:

1. The 5th Amendment to the Constitution of the United States.
2. The 14th Amendment to the Constitution of the United States.
3. Sherman Act §§1 and 2 15 U.S.C. §§1 and 2.
4. Lanham Trade Mark Act §43(a) 15 U.S.C. §1125 (a).
5. 15 U.S.C. §1338 (b).

6. Rule 8(e)[2] Federal Rules of Civil Procedure.

7. Rule 41(b) Federal Rules of Civil Procedure.

8. Rule 52(a) Federal Rules of Civil Procedure.

which are reproduced in Appendix C.

STATEMENT OF THE CASE

The petitioners sued the respondents and others under §§1 and 2 of the Sherman Act 15 U.S.C. §§1 and 2 (hereinafter the Sherman Act) seeking treble damages under §4 of the Clayton Act 15 U.S.C. 13(e).

This lawsuit arises out of factual situations including price-fixing, boycott, refusals to deal to protect the price-fix, and unfair competition.

The purpose of the conspiracy was to protect Progressive's price-fix and to destroy competition in the state of Utah in the line of musical equipment known as Frets Electronics and Percussion (hereinafter (FEP). This purpose was accomplished by Progressive conspiring with the defendant manufacturers to boycott Olsen and other dealers, refusing to deal with Olsen and other dealers to protect the price-fix, engaging in acts of territorialization trade name infringement and other acts of unfair competition driving all other competitors out of the business in order to protect the price-fix specifically proven as to CBS Instruments.

The acts of unfair competition included trade name infringement, inducement of the petitioner's employees to work for the defendant Progressive in the price-fix, the taking over of the petitioner's store locations and

customers, the unauthorized use of petitioner's trade name secrets (copyrighted music), and the transfer of franchises.

During the time the conspiracy was in effect, there was little or no competition with the CBS complete line of quality instruments.

Named as defendants in petitioner's complaint and amended complaint are Progressive Music Supply, Inc. (hereinafter Progressive); Accoustic Control Corp. (hereinafter Accoustic); Ovation Instruments, Inc., a/k/a Kaman Corp., Norlin Music Inc., formerly Chicago Musical Instruments (hereinafter (Norlin); CBS Musical Instruments (a division of CBS, Inc.), (hereinafter CBS); ARP Instruments (hereinafter ARP); and Peavey Electronics Corporation (hereinafter Peavey).

The claims against ARP and CBS have been dismissed. Also, Judge Anderson, the trial judge, granted several of the defendants' motions to dismiss on behalf of claims against Norlin, Ovation, and Peavey. Petitioner's Section 2 Sherman Act claims against Progressive involving attempt and conspiracy to monopolize were also dismissed. All claims against Accoustic and Ovation were dismissed prior to appeal leaving defendants, Norlin, Peavey and Progressive in the appeal.

The trial Court found that Progressive had conspired with CBS and others to restrain trade by fixing prices in violation of the Sherman Act, but that Olsen as a direct horizontal competitor suffered no injury as a result of this conspiracy. The Court also found that Progresive had violated Section 1 of the Sherman Act

by conspiring to boycott Olsen from receiving CBS products awarding damages of $4,303.00, before trebling, plus attorney's fees.

The Appellate Court affirmed all of the trial courts findings.

A new cause of action against CBS arising from continuation of the same claims awaits decision at the 10th Circuit Court, No. 82-2398.

In 1964, Petitioner Clair Olsen (hereinafter Olsen) along with George Best and Earl Reed formed Guitars, Inc., using the trade name Guitar City Studios. The business was started by purchasing from Bud Eastman his going profitable business including the franchises of CBS, Chicago Music Instruments (now Norlin, Inc.) and Gretch Musical Instruments.

Prior to purchasing the above-mentioned franchises, Olsen had agreements that each of the manufacturers would deal. However, after the purchase was completed CBS refused to deal with petitioner. Olsen proved at the trial that the CBS's refusal to deal was to protect the price-fix.

The three principals of Guitar, Inc., Olsen, Best and Reed, operated separate stores on a part-time basis. However, they had entered into a written contract that when the gross sales reached $50,000.00 per year they would all work full-time. The $50,000.00 condition was never met because of the proven conspiracy.

In 1970, disagreements arose between the principals of Guitars, Inc., because none could earn a living while the conspiracy was in effect. This caused a separation

of the principals to operate independent stores, retaining the corporate form for administrative purposes.

During the time the conspiracy was in effect, Progressive Music was the largest combo and electronic instrument dealer in Utah dealing with all the independent manufacturers, exclusively with ARP, Accoustic, CBS, Peavey and on some products with Norlin.

In 1974, Olsen began to operate his store full-time when equipment to compete with the CBS complete line came into the market. From 1974 to 1978, Olsen's business grew from seven percent (7%) of the size of Progressive's business to seventy percent (70%). The proven demonstratable economic affect of the consipracy continued in effect until at least 1976. The Trial Court refused to receive any evidence of damages past 1974 and adopted 1975 as the base year to calculate damages.

REASONS FOR GRANTING THE WRIT

The most important reason for granting the writ is that the decision of the Court of Appeals is contrary to the letter and spirit of the antitrust laws, the Federal Rules of Civil Procedure, and the basic principles of modern federal practice articulated by this Court, and the majority of other Circuits. The area of dispute involves basic questions of fundamental rights guaranteed by the constitution, antitrust laws, and federal civil procedure of which the Tenth Circuit is in conflict with the decisions of the U. S. Supreme Court and many of the Circuits. This subject has importance to the antitrust practitioner and to this Court

in its capacity as overseer of the administration of justice in the federal court system.

SUMMARY OF THE ARGUMENT

Petitioners Argument will focus on the four questions presented. In the first part of the Argument Petitioner will discuss the propriety of the lower court's dismissing the Defendant manufacturers Norlin and Peavey, pursuant to Rule 41(b) in lieu of the evidence showing the anticompetitive effects of the exception to their normal distribution systems.

Next, Petitoner will focus on the impropriety of the lower court's dismissing in silence the unfair competition claims after commenting that they did impact unfairly on the Petitioner.

Next, Petitioner will focus on the impropriety of the lower court's reducing the damages by mere speculation. Petitioners will then conclude by discussing the Trial Court dismissing the §2 claims.

ARGUMENT

POINT I

THE CIRCUIT COURT ERRED IN AFFIRMING THE DISMISSAL OF PEAVEY AND NORLIN.

The Circuit Court's decision in this case is in conflict with this Court's holding in *Klors v. Broadway Hale Stores*, 359 U.S. 207 (1959); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977) and *Continental Ore v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962). Also, the decision is in conflict with the Fifth Circuit

in *Cadillac Overall Supply Co. v. United States*, 568 F. 2d 1078 (5th Cir. 1978), as well as with its own holding in *Morton Salt Co. v. Royal Crystal Salt Co.*, 235 F. 2nd 573 (10th Cir. 1956).

The decision in this case is at odds with the abovementioned cases in three areas. First, the petitioner proved a group boycott under *Klors, supra*, and the court erred in dismissing Norlin and Peavey pursuant to a 41(b) Motion. Second, petitioner further proved that the refusals to deal by Peavey and Norlin to grant Progressive an exclusive dealing, had an anticompetitive effect in the market as required under *GTE Sylvania, supra*, rule of reason analysis and therefore it was improper to dismiss Norlin and Peavey on a 41(b) Motion. Third, the court's dismissal of Norlin and Peavey dismembered the conspiracy contrary to this Court's holding in *Continental Ore, supra*. Each of the above-mentioned areas will be discussed separately.

A. GROUP BOYCOTT UNDER *KLORS, SUPRA*

In *Klors, supra*, that court held that an agreement between a retailer and various manufacturers to exclude a horizontal competitor from receiving certain products constituted a group boycott that was a per se violation of the antitrust laws. This court noted in *Klors* that the alleged conduct was: "not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers distributors and a retailer." Id. at 210. The court goes on to state that the combination took away *Klors*' freedom to buy products in "an open competitive market." Id.

Like *Klors, supra,* the Petitioner alleged the same type of conspiracy between a retailer and the various manufacturers. At trial, the Petitioner submitted the following evidence establishing the parallel conduct of the conspiracy which should have precluded the granting of Norlin and Peavey's 41(b) Motion.

The evidence showed that Progressive was the largest retailer of FEP in the State of Utah. See, T. Ex. P-103, Penman Depo. p. 29. Progressive's business policy was to be protected from price competition. See, undisputed testimony T. April 30, 1979, p. 22. The protection from price competition was achieved by Progressive's policy of seeking and obtaining exclusive dealing agreements with manufacturers Penman Depo. p. 85 and by cornering the best lines in the trade T. May 21, 1979, pp. 111-114, to sell at noncompetitive price. T. Vol. II, p. 249.

Norlin participated in the conspiracy in the following manner: It created an exception to its normal distribution system by granting to Progressive an exclusive on its synthesizers, Pearl Drum products and electronic keyboards, in the State of Utah T. Ex. P. 87, 88 and 89, allowing Progressive to sell them at noncompetitive prices above retail.

Norlin eliminated all the competitors on its Pearl Drum products by refusing to sell to Petitioners and other dealers, even though Norlin's own business records show that Petitioners were authorized to purchase the drums. See T. Exp. p. 87, 88 and 89; A-12 and T. Vol. V p. 1190.

As mentioned above, Norlin created an exception to its normal distribution policy. The Sixth Circuit in

Com-Tel, Inc. v. DuKane Corporation, 669 F. 2d 404, (6th Cir. 1982), based on *GTE Sylvania, supra*, held that an exception to the normal distribution policy combined with an anticompetitive effect created a per se violation of the antitrust laws. Therefore, the fact that Norlin's exclusive with Progressive was an exception and anticompetitive would require a holding that Norlin had violated the antitrust laws.

Peavey participated in the conspiracy in the following manner: Peavey granted Progressive an exclusive to allow Progressive to fix high noncompetitive prices, Penman Depo. pp. 67 and 109. Peavey would not make independent decisions to deal but, gave the name to Progressive to control the price-fixing, Penman Depo. pp. 88-89.

Peavey agreed with Progressive to stop national advertising of lower prices so that Progressive could maintain higher prices. See, T. April 30, 1979, p. 59, The exclusive between Peavey and Progressive was an exception to Peavey's normal distribution system. See, T. April 30, 1979, pp. 62-63. Like Norlin, this would require a per se violation pursuant to *Com-Tel, Inc., supra.*

The Petitioner proved that both Norlin and Peavey participated in the conspiracy in order to protect Progressive's price-fix. The Defendants have consistently tried to characterize their conduct as vertical restriction under *GTE Sylvania, supra*, requiring a rule of reason analysis. However, the clear weight of the evidence shows that the purpose of the restraints was to protect the Progressive price-fix. Therefore, under this Court's reasoning in *Klors, supra*, a per se standard

should have been applied requiring a finding that both Peavey and Norlin's parallel conduct established their participation in the group boycott.

B. PETITIONER MET ITS BURDEN UNDER *GTE SYLVANIA, SUPRA.*

Even if this Court rejects the per se argument stated above, the Circuit Court's decision is in conflict with this Court in *GTE Sylvania, supra.*

In *GTE Sylvania, supra,* this Court held that non-price vertical restriction were to be evaluated under the rule of reason standard. If the Court were to adopt the rule of reason standard then the Petitioner would have to prove the anticompetitive effect in the relevant market, *GTE Sylvania, supra.*

The demonstrable economic effect showed that both Peavey's and Norlin's exception to their normal distribution system produce an anticompetitive effect in that they eliminated competition in Utah while competition flourished in surrounding states as to Peavey, T. April 30, 1979, p. 62-63, T. Exp. p. 87, 88 and 89 as to Norlin. Progressive's prices were higher than in surrounding states, T. Exs. A-1, p. 96, and there was no business reason for the higher prices, they just raised prices to whatever they wanted, T. April 30, 1979, pp. 34-36.

As to proving the effect in a relevant market, the petitioner established the relevant market was professional instrument as opposed to amateur instrument. See, *Eastman Kodak Co. v. Southern Photo Material Co.*, at 273 U.S. 376 (1927). However, the lower courts rejected this classification implying that it was im-

proper. In this regard, the lower court is in conflict with *Eastman Kodak Co., supra,* in which this Court had no problem with such professional versus amateur classification. For the Trial Court to grant Norlin and Peavey's 41(b) Motion in the face of the demonstrable economic effect without requiring any evidence as to the reasonableness of the exception to their normal distribution policy or to even allow inquiry into what those policies were is to replace the rule of reason analysis with an assumption of reasonableness rule. Therefore, this Court should grant the Writ of Certiorari to review this aspect alone.

Furthermore, to allow the dismissal of Norlin and Peavey pursuant to a 41(b) Motion, the Court "must consider the evidence in its strongest light in favor of the party against whom the Motion for a directed verdict is made and must give him the advantage of every fair and reasonable intendment that the evidence can justify." *Continental Ore, supra.*

C. DISMEMBERING THE CONSPIRACY.

In this case, the Petitioner submitted evidence and the Court found that Progressive Music conspired to fix prices. Evidence was also submitted showing that both Norlin and Peavey joined in that conspiracy by refusing to deal with the Petitioners in order to protect the price-fix. The law is clear that it only takes a small amount of evidence to join a defendant to a proven conspiracy. *Cadillac Overall Supply, supra; Morton Salt Co., supra.*

Furthermore, by affirming the dismissal of Peavey and Norlin, the Circuit Court is in conflict with this Court's holding in *Continental Ore, supra.* In *Conti-*

nental Ore, supra, this Court held that the conspiracy should not be dismembered, but should be viewed as a whole. By dismissing Peavey and Norlin, the District Court dismembered the conspiracy which dismembering was affirmed by the Circuit Court in conflict with *Continental Ore, supra.*

ARGUMENT

POINT II

UNFAIR COMPETITION AND THE ANTITRUST LAWS

At trial the Petitioners presented evidence on several aspects of unfair competition in furtherance of a conspiracy violating the antitrust laws. The unfair competition consisted of infringement of exact trade name, inducement of employees to work for Defendants in the price-fixing conspiracy, the take-over of Petitioner's store locations, use of Petitioner's trade secrets (copyrighted music) and transfer of franchises. While the trial court commented that the trade name infringement impacted unfairly on the Petitioners' it dismissed the trade name infringement, along with other unfair competition issues in silence by failing to make any findings of fact on those issues.

The failure to make findings of fact is clearly erroneous pursuant to Rule 52(a) of the Federal Rules of Civil Procedure and is reversible error. *Smith v. Dravo Corp.,* 208 F. 2d 388 (7th Cir. 1953). Citing controlling Supreme Court precedent.

The trial court's dismissal of the unfair competition issue in silence leaves one with uncertainty as to what

the court's intentions were concerning those aspects of the litigation. For the Circuit Court to follow suit by not addressing the issue only furthers the uncertainty.

The lower court's failure to address the unfair competition issue creates a strong impression that the courts considered the unfair competition issues either did not raise to the level of the federal question or they are not actionable for damages under the antitrust laws.

Like the District Court, the Circuit Court failed to address the issue of unfair competition. The Circuit Court's failure to specifically address the issue places it in conflict with the other circuits holding that a failure to make finding is reversible error. *Smith v. Dravo Corp., supra.*

Furthermore, the Circuit Court's failure to address the issue and in effect dismissing it again in silence, raises the uncertainty issue. The Petitioners will address the above mentioned uncertainty as follows:

A. ARE ACTS OF UNFAIR COMPETITION ACTIONABLE UNDER THE ANTITRUST LAWS?

If we are to assume that by dismissing in silence the trade name infringement and unfair competition the court was making a statement that those issues are not actionable under §1 of the Sherman Act. The Tenth Circuit Court has then stepped into the middle of the significant raging conflict between the circuits which then compels this Court to hear this case in order to resolve the dispute.

A review of the case law shows that two views have been adopted among the circuits that have decided the issue of unfair competition being actionable under the antitrust laws. First, the so-called "narrow view" followed in the Seventh Circuit that unfair competition is not actionable under the antitrust laws, *Norville v. Globe Oil and Refining Co.*, 303 F. 2d 281 (7th Cir. 1962) (affirming the dismissal of the complaint in alleging unfair competition as violation of §1 of the Sherman Act) and *Parmelee Transportation Co. v. Keeshin*, 292 F. 2d 794 (7th Cir. 1961) (finding no antitrust violation where various acts of unfair competition were engaged in, including the bribing of public officials). The second view, the so-called "broad view" followed by the First, Third and Fifth Circuits, and formerly the Tenth Circuit, that unfair competition is actionable for damages under the antitrust laws. See *Albert Pick Barth v. Mitchell Woodbury Corp.*, 57 F. 2d 96 (1st Cir.) *cert. denied*, 286 U.S. 552 (1932) (holding that conspiracies involving unfair trade practices establish a per se violation). *Atlantic Heel Co. v. Allied Heel Co.*, 284 F. 2d 879 (1st Cir. 1960); *Perrington Wholesale, Inc. v. Pioneer Dist. Co. of Kansas*, 353 F. 2d 613 (10th Cir. 1965); *Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F. 2d 83 (5th Cir. 1978) and *Cherokee Laboratories, Inc. v. Rotary Drilling Services*, 383 F. 2d 97 (5th Cir. 1967).

All of the cases mentioned under the "broad view" hold that there is a cause of action under §1 of the Sherman Act for unfair competition. However, there still is some uncertainty and conflict between whether a per se standard is to be applied or rule of reason approach is to be used. See *Atlantic Heel Co. v. Allied*

Heel Co., supra, a First Circuit case as opposed to *Northwest Power Products, Inc. v. Omark Industries, Inc., supra*, a Fifth Circuit case.

In any event, the one thing that is clear is that there is a considerable amount of uncertainty and conflict between the circuits with little guidance from this Court as to whether or not unfair competition is actionable under the antitrust laws and as to what standards should be used. As pointed out in 18 Boston College Industrial and Commercial Law Review, p. 239 at 274:

> Pick Barth and its progeny, pro and con, have been with us for more than four decades. The courts have, however, failed to develop a sound and uniform approach to the issues raised by the cases, *to the contrary in many instances they have adopted rather arbitrary positions which are inconsistent with federal antitrust policy.*

(Emphasis added.) Also, as pointed out in *Northwest Power, supra*: "Even if we were to adopt the law of the forum state, the *cases defining unfair competition are likely to be in noticeable disarray.*" (Emphasis added.)

The controversy whether unfair competition is actionable under the anti-trust laws has not been resolved at the time of filing this appeal. See *J. McCarthy, Trade Marks and Unfair Competition*, Vol. 1 Pocket Supplement 1982 §§ 1-3, 1-9, and 1-14 and cases cited.

Due to the great uncertainty over the question whether unfair trade practices are actionable under the antitrust laws, it is imperative that this Court exercise its discretion and grant the Writ of Certiorari to

review the decision of the Circuit Court to solve the controversy. The following questions require this Court to render an answer:

1. Is unfair competition actionable in the Federal Court under the antitrust laws? If so, which standard should be applied?

2. Is there a federal law of unfair competition? If so, what is the extent of its jurisdiction?

3. Specifically with regard to the case above, is the infringement of a direct competitor's trade name in the furtherance of a proven per se illegal conspiracy actionable for damage? If so, what are the measures of damages and should the per se rule be applied to that issue?

B. ARE TRADE NAME INFRINGEMENTS AND UNFAIR COMPETITION AN INSEPARABLE PART OF THE FEDERAL QUESTION?

If we are to accept the Court's dismissal of this issue in silence, it leads to the conclusion that the lower courts felt that the trade name infringement and other unfair competition issues are not part of the federal question. The decision of the Circuit Court is clearly in conflict with this Court's holding in *Hurn v Oursler*, 289 U.S. 238 (1932) in 28 U.S.C. 1338(b) and *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926) cited in *Hurn, supra*, as to antitrust (which holds that the federal courts do have jurisdiction over unfair competition claims even after the federal claim has been dismissed), and also with the Circuit Court's

own holding in *Big "O" Tires v. Goodyear Tire & Rubber Co.*, 561 F. 2d 1365 (10th Cir. 1977).

Therefore, this Court should grant the Writ of Certiorari because it is clear that our Circuit Court is out of line with the rest of the federal courts.

C. DENIAL OF DUE PROCESS.

Furthermore, the Tenth Circuit's dismissal in silence of the unfair competition is a fundamental denial of due process to the Petitioner in this case. Federal Rules of Civil Procedure 8(e)(2) provides that Plaintiff is entitled to as many causes of action as he has. Federal Rules of Civil Procedure 52(a) provides that in cases tried by the Court, it is required that the Court make findings of facts and not dismiss the issues in silence.

In this case, Petitioner put forth evidence that the Respondent/Defendant Progressive Music infringed Petitioner's exact trade name as part of the conspiracy to violate the antitrust laws and to drive Petitioner out of business. It is well settled that infringement is actionable for damages even in cases of similarity of infringement. *Bluebell Refining Co. v. Frontier Refining Co.*, 213 F. 2d 354 (10th Cir. 1954). More recently the Tenth Circuit Court has also held that the Lanham Trade-Mark Act §43 (a) 15 U.S.A. §1125(a) protects even trade name infringement where there is not a registered trademark but only a common law trademark. In *Big "O" Tire Co. v. Goodyear Tire Co.*, 561 F. 2d 1365 (10th Cir. 1977), the law being clear that the trade name infringement is an actionable cause of damage. For the lower courts to dismiss the issue in silence by failing to make findings of fact on the issue

presents a clear question of the Petitioner being denied due process of law guaranteed by the Fifth and Fourteenth Amendments. Such denial of due process mandates that this Court should grant the Writ of Certiorari and reverse the Circuit and District Court's on that issue alone so that the substantial rights of Petitioner are protected. Otherwise, the rules, statutes and constitution become meaningless.

POINT III

DAMAGES WERE REDUCED BY SPECULATION.

The Circuit Court's calculation of damages is in conflict with this Court in *Zenith Radio Corporation v. Hazeltyne Research*, 395 U.S. 100 (1969); *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 261 (1946), and *Eastman Kodak Co. v. Southern Photo Material Co.*, 273 U.S. 359 (1927) as well as with other circuits in *Flintkote Company v. Lysfjord*, 246 F. 2d. 368 (2d Cir. 1957), and *William Goldman Theaters, Inc. v. Lowe's, Inc.*, 164 F. 2d 1021 (3rd Cir.) *cer. denied*, 334 U.S. 811 (1946).

At trial, the Court concluded the Petitioners proved a reasonable damage theory based on market share, T. Ex. p. 248. Defendants presented a damage theory based on sales, T. Ex. A-30, unsupported by any expert testimony. However, the Trial Court adopted defendant's damage theory then reduced damages by an additional thirty percent (30%) based on admitted speculation. The speculation being the amount that Petitioner damages should be reduced because of the effect of Petitioner going to work full-time in 1974. The

Court stated that *no direct evidence on this point was introduced at trial.* Amended Findings p. 39a.

In affirming the Trial Court's reduction based on admitted speculation, the Tenth Circuit in direct conflict with the above-mentioned cases, which hold that Plaintiff is entitled to his reasonable, proven damages and to the highest damage award that can be proved at trial. As the Second Circuit held in *Lowe's, supra;* when two equally supported theories of damages are introduced to the Court, the higher of the two must be used. In this case, two reasonable theories were introduced and the Court should have applied the higher theory introduced by Petitioners. However, the Court did not even accept the lower of the two reasonable theories, but rather adopted its own theory admittedly based on speculation.

The Court reasoned that because Olsen was working full-time during the base year, part of his profits should be used in determining damages and, accordingly, reduced the amount of profits in that year by thirty percent (30%). The Court admits that no direct evidence was introduced supporting its arbitrary reduction. Therefore, the allocation of profit in reducing damages could only be based on pure speculation.

The arbitrary reduction of damages without some proof determining the amount of the allocation is in direct conflict with this Court's holdings in *Bigelow, supra,* and *Eastman Kodak, supra.* These cases hold that the burden of uncertainty is on the wrongdoer. *See also* Von Kalinowski Antitrust Laws and Regulations, §115.02(2).

The Circuit Court's decision is also in conflict with *Zenith Radio Corp, supra.* In that case, this Court held

that defendant has the burden to prove other causes of the plaintiff's injuries once the injury has been proven. In effect, the Trial Court by the arbitrary reduction in damages places the burden on the Petitioners to clear up uncertainty and to prove no other causes of their injuries.

In addition, the Trial Court's reasoning overlooks the evidence that argues against the reduction of the damages. That evidence being that during the conspiracy, Guitars, Inc., had three people managing three stores on a part-time basis and they could not penetrate the market because of the boycott and refusal to deal to protect the price-fix. Even if some of the increase in profit after the end of the boycott could be attributable to the fact that Olsen was now working full-time, no reduction should have been made because the evidence clearly gives the inference that Olsen's failure to work full-time was due to the boycott. Therefore, the amount of profits that he lost because of his inability to penetrate the market and consequently being unable to work full-time and make a living, is simply a part of his damages. If there was any evidence on the issues of the amount of his profits, that could be attributed to his working full-time. That would be simply one element of his damages which he should be able to recover because of the conspiracy barring his efforts to penetrate the market.

In effect, the Court is stating that Olsen was in control of the conspiracy and could have ended it at any time by going to work full-time. Not only is the above thought ludicrous, it is contrary to the evidence. The demonstrable economic evidence shows that even if Olsen was working seven (7) days a week 365 days a year, he still could not have penetrated the market. See

Plaintiff's Exhibit 221 Appendix D, which shows that during the time the conspiracy was in effect no one could penetrate the CBS market in Utah.

The Trial Court also made an error by failing to award multiple damages where separate multiple injuries were proven. Plaintiff is entitled to recover damages for injuries sustained by way of the boycott, refusal to deal to protect the price-fix, and trade name infringement. Failure of the Trial Court to award damages for these multiple causes of injury is in conflict with *Albrecht v. Herald*, 452 F. 2d 124 (8th Cir. 1971). See also 16 ALR Fed. 14 and *Zenith, supra*, holding that the plaintiff is entitled to recover multiple damages for multiple injuries. Consequently the Court should grant a Writ of Certiorari in this case so they can review the decisions on damages and resolve the dispute.

POINT IV

THE LOWER COURTS ERRED IN DISMISSING THE SHERMAN ACT SECTION 2 CLAIMS.

Petitioners § 2 claims consist of conspiracy and attempt to monopolize. The lower courts dismissed the § 2 conspiracy to monopolize claims based on Petitioners failure to prove two of the four required elements of proof in § 2 conspiracy to monopolize cases. Those two elements are: 1) an appreciable amount of commerce; 2) specific intent.

With regard to the commerce issue, the lower courts findings are clearly erroneous under the test of Federal Rules of Civil Procedure 52(a) or they will stand as new precedent setting law as the single exception

case in the entire judicial system where the effect on commerce was satisfied for a § 1 violation of the Sherman Act, but not for a § 2 violation. See, Amended Findings at Conclusion of Law No. 4, where the commerce requirements are met for a § 1 violation. See, Tenth Circuit Opinion at p. 11a, where the commerce requirement is not met for § 2 claims. Also see, Kintner, "*Federal Antitrust Law,*" Vol. II, 1980 §14.4, n. 27. "Indeed there exists *no reported case in which the subject of a conspiracy to monopolize has been held to be too small to constitute, 'an appreciable part' of commerce.* See generally, 2 J. Von Kalinowski Antitrust Laws and Trade Regulations. § 9.01 [4], (1976). (Emphasis added.)

The lower court rulings in our case separated the proven § 1 conspiracy issues from the § 2 claims when they should have allowed the § 1 evidence to merge with the § 2 claims. United States Attorney General National Committee to Study the Antitrust Laws, (1955), p. 61 § c., citing *United States v. Swift,* 196 U.S. 375, (1905) for the basic statement of the rule, in part: "*When a conspiracy or combination is involved proof of this intent merges with proof of the conspiracy.*" (Emphasis added.)

Addressing the specific intent issue, this Circuit Court's opinion is in conflict with itself. This is evidenced where Petitioners meet the specific intent burden of proof under attempt to monopolize. Tenth Circuit Opinion at p. 9a. Then, inexplicably, Petitioners fail to meet the burden of specific intent in the *same conspiracy* under conspiracy to monopolize. See, Tenth Circuit Opinion at p. 12a.

The lower courts dismissed the § 2 attempt to monopolize claims based on Petitioners failure to prove

two of the four required elements of proof in attempt cases. Those elements are: 1) dangerous probability; and 2) relevant market.

Addressing the dangerous probability issue, the lower courts opinions are clearly erroneous because proof of dangerous probability merges with proof of the § 1 violation. *United States v. Swift, supra.* Specifically, the lower courts found a legal monopoly coexistent with an illegal conspiracy. Tenth Circuit Opinion at p. 11a. The lower courts also made conflicting findings. See, Amended Findings at p. 38a, where there was little competition for CBS instruments until 1974-75. Such a finding makes the CBS legal monopoly illegal. *Smith Klein Corp v. Eli Lilly & Co.*, 575 F. 2d 1056, (3rd Cir.) *cert. denied*, (1978), citing the narrow or intrabrand rule for monopoly. The lower courts in our case made no effort to explain the legal monopoly as it related to intrabrand competition, where little interbrand competition existed as to the complete line of CBS instruments.

Addressing the relevant market issue, relevant market is not required in per se cases; *United States v. Griffiths*, 334 U.S. 100, 92 L. Ed. 1243, (1948). Our case is a per se case. See, Tenth Circuit Opinion at p. 13a. Petitioners attempted to use a professional instrument market as separated from an amateur instrument market. That theory was rejected by the lower courts, thereby inferring that amateurs and professionals play the same instruments. Petitioners market theory was a classic viable theory. *Eastman Kodak v. Southern Photo Material Co.*, at 273 U.S. 376, 47 S. Ct. 404. Even so, the CBS market in Utah was totally exclusionary, eliminating *all competitors* to protect anticompetitive price-fixing. See, Trial Exhibit P-221 at-

tached in Appendix D. If the lower court opinions are allowed to stand in our case, this will be the first case on record to find a legal monopoly where competitors have been foreclosed from a substantial market to protect illegal price-fixing. See, *United States v. International Salt*, 332 U.S. 392, 68 S. Ct. 12 (1947), where such foreclosures are per se illegal.

There also exists in the judiciary, a significant controversy between the circuits as to what elements of proof are required in § 2 attempt and conspiracy cases. *Lessig v. Tidewater Oil Co.*, 327 F. 2d 459 (9th Cir. 1964). Dangerous probability and relevant market were not required in *Lessig, supra*, to prove a violation. The Supreme Court has never directly confronted the *Lessig* case exception to guide the judiciary, leaving only dicta to assure uniformity in the judicial process. *Walker Process Equip., Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 86 S. Ct. 347, (1965). Cited for that purpose in *Kintner, supra*, Vol. II § 13.

The lower courts holdings on the § 2 claims creates confusion in interpreting the antitrust laws. This is so because the lower courts held that Petitioner was actively and aggressively fighting the conspiracy to monopolize in his efforts travelling around the country to gather product wherever he could and thereby precluding monopoly. See, Tenth Circuit Opinion at p. 9a. *"The likelihood that monopolization would occur was very remote because Olsen showed himself to be a very aggressive competitor."* The Circuit Opinion is saying that if one competitor is vigorously defending the right of free enterprise and competition in this country, then those attempting to monopolize will never be held liable for damages even though they may have driven all other competitors in the geographical market from the

trade. Since that is exactly what happened in our case, specifically as to the CBS line of goods for which there was little competition until 1974-75, that holding alone should spark this Court to grant a Writ of Certiorari to the Opinion of the Circuit Court to see that justice is done in the Court's capacity as supervisor of the antitrust laws.

CONCLUSION

For the foregoing reasons Petition's respectfully request this court to issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review the decision of that Court.

JUN 15 1983

DATED this .... day of ...., 1983.

Respectfully submitted,

SUMMERHAYS, RUNYAN
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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 82-1357 and 82-1400

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah Corporation,

Plaintiffs-Appellants,

vs.

PROGRESSIVE MUSIC SUPPLY, INC.; NORLIN MUSIC, INC., formerly CHICAGO MUSICAL INSTRUMENTS; and PEAVEY ELECTRONICS, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the District of Utah

(D.C. No. C-75-153)

EDWARD T. WELLS and W. ANDREW CLAWSON of Summerhays, Runyan and McClelland, Salt Lake City, Utah (LOWELL V. SUMMERHAYS, of Summerhays, Runyan and McClelland, Salt Lake City, Utah, on the brief), for Plaintiffs-Appellants.

STEPHEN G. CROCKETT, of Larsen, Kimball & Parr, Salt Lake City, Utah, for Defendant-Appellee Progressive Music Supply, Inc.

BRYCE E. ROE, of Roe and Fowler, Salt Lake City, Utah, for Defendant-Appellee Norlin Music, Inc., formerly Chicago Musical Instruments.

CURTIS L. FRISBIE, JR., of Gardere & Wynne, Dallas, Texas (Mark W. Bayer, of Gardere & Wynne, Dallas, Texas, with him on the brief), for Defendant-Appellee Peavey Electronics, Inc.

Before MCWILLIAMS, DOYLE and SEYMOUR, Circuit Judges

DOYLE, Circuit Judge

The plaintiff Olsen does business as Guitar City Studios, Inc., and he brings this action pursuant to Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 2(e) of the Clayton Act, 15 U.S.C. 13(e).

Named as defendants in Olsen's complaint and amended complaint are Progressive Music Supply, Inc.; Acoustic Control Corporation; Ovation Instruments, Inc. (a/k/a Kaman Corporation); Norlin Music, Inc. (formerly Chicago Musical Instrument Company); CBS Musical Instruments (a division of CBS, Inc.); ARP Instruments, Inc.; and Peavey Electronics Corporation.

The claims against ARP and CBS have been dismissed. Also, Judge Anderson, the trial judge, granted several of the defendants' motions to dismiss on behalf of claims against Norlin, Ovation, Acoustic and Peavey. Olson's Section 2 Sherman Act claims against Progressive involving an attempt to monopolize and conspiracy to monopolize were also dismissed.

Finally, the court found that there were only two counts on behalf of the appellants which had merit. First, the court determined that Progressive had conspired to restrain trade in violation of Section 1 of the Sherman Act. The court, however, found that Olsen had suffered no injury as a result of this conspiracy, and so the court concluded that Olsen was not entitled to damages based on this conduct. Second, the court held that Progressive had violated Section 1 of the Sherman Act by conspiring to boycott Olsen from receiving CBS products. Damages were found to total $4,303, which, after trebling, amounted to $12,909.

I.

FACTUAL BACKGROUND

Olsen was and is engaged in the retail sale of musical instruments in the Salt Lake City, Utah area. During the period commencing in 1964 and continuing to 1975, Olsen's business was conducted under the name of "Guitars, Inc.," a Utah corporation. One of the several people associated with Olsen in this venture was George Best. Until 1970, Olsen operated an outlet at Kaysville, Utah, and Best operated an outlet at Bountiful, Utah. Guitars, Inc. ordered instruments for both stores, paid half of the telephone bills of each store, and held the franchises in its name. The proceeds from sales by the stores were forwarded to Guitars, Inc. After the bills were paid, those proceeds were divided among Olsen, Best and an associate named Steven Hight.

During the year 1970 there was a disagreement between Olsen and Best, and they executed a separation agreement which essentially terminated all business relations between them, and then each began conduct-

ing his own business operation, essentially as sole proprietors of each store. Guitars, Inc. still served as a purchasing entity. Following this division, Best entered into a brokerage agreement with the defendant Progressive Music Supply, Inc., which is said to be one of the largest retail music instrument dealers in Utah.

In February of 1975, Olsen formed a new corporation, Guitar City Studios, Inc., and during the time leading up to that several changes were made in Olsen's business. Prior to 1974, Olsen had operated his Kaysville store on a part-time basis. In 1974 he moved his location and commenced business full-time. Olsen had also added a repair service to his business.

Following the changes made in his business operations, Olsen's sales increased dramatically. Prior to 1974 he sold about 7% of the volume that was sold by Progressive, the market leader in Utah. After changing his business to a full-time operation, Olsen's sales rose, until in 1977, they were approximately 70% of Progressive's sales.

After Best entered into the brokerage agreement with Progressive in 1971, Olsen maintained that he had difficulties in obtaining musical instruments from various manufacturers. The defendant manufacturers involved in the present litigation were willing to make Olsen a dealer, but later refused to sell to Olsen, due to commitments to Progressive. This is according to Olsen's allegations. Olsen maintains that he was thus forced to obtain or bootleg instruments through other dealers at higher costs, and that this caused actual financial loss. As a result, in April of 1975, Olsen and Guitar City Studies, Inc., brought suit against Progressive and six manufacturers.

The case based upon Section 1 of the Sherman Act alleges that Progressive conspired separately and jointly with each manufacturer to fix prices, establish Progressive as each manufacturer's exclusive dealer in the state of Utah, terminate Olsen's dealing in each manufacturer's products (except as against Peavey), and boycott Olsen's business. A further complaint on behalf of Olsen was that Progressive conspired with certain unnamed co-conspirators, for example, George Best, CBS Musical Instruments (CBS) and Bobbie Herger (owner and operator of Herger's Music Store in Provo, Utah), in violation of Section 1 of the Act. Olsen asserts that Progressive conspired with Best to cause Olsen to lose franchises, to destroy his credit and business reputation, to take over his business location and terminate his corporate charter, to fix prices, and to cause manufacturers to boycott his business. Further allegations by Olsen as against Progressive and CBS were that, with the help of Herger, they conspired to establish Progressive as CBS's exclusive dealer for the state of Utah, to fix prices, to terminate Olsen as a CBS dealer, to boycott Olsen's business and to cause CBS to require other dealers not to sell CBS products to Olsen. Olsen's final allegation is that the defendants conspired together to boycott Olsen and to attempt to monopolize the Utah market in certain musical instruments.

II.

THE CLAIMS AGAINST NORLIN, OVATION AND PEAVEY

These named defendants are shown to be manufacturers of musical instruments. As to Norlin, there were a total of sixteen charges of unfair practices and

competition. As to Ovation, there were four such charges, and as to Peavey, there were three such charges. There was also a general allegation against Norlin, Ovation, Peavey and others that they had conspired together to boycott Olsen and had conspired to create a monopoly on behalf of Progressive. Following the presentation of the evidence, the defendants moved for dismissal based upon insufficiency of the evidence. The court said that Norlin had refused to deal with Olsen only as a business convenience, and not for any anti-competitive purpose. Also the trial court determined that Norlin had not committed the anti-competitive acts alleged by Olsen, and that Norlin treated Olsen and Progressive similarly.

As to Ovation, the court, upon weighing the evidence, concluded that Ovation had not violated any of the sections of the Sherman Act.

Finally, with respect to Peavey, the trial court weighed the evidence and the inferences to be drawn therefrom and reached the conclusion that Peavey had not conspired with any other defendant contrary to Section 1 of the Sherman Act. And, according to the court, Peavey had not conspired to fix prices or to create a monopoly on behalf of Progressive.

We conclude that the trial court was correct in making these rulings.

III.

DISMISSAL OF OLSEN'S CLAIMS AGAINST NORLIN, OVATION AND PEAVEY.

In reviewing the propriety of the rulings, we are governed by the clearly erroneous test. Fed. R. Civ. P.

41(b), 52(a). *See* Blankenship v. Herzfeld, 661 F. 2d 840, 845 (10th Cir. 1981); *and see* Woods v. North American Rockwell Corp., 480 F. 2d 644, 645-46 (10th Cir. 1973).

It is Olsen's position that when a 41(b) motion is imposed in an anti-trust case, the evidence must be viewed in a light most favorable to the plaintiff. In light, however, of *Blankenship,* which also involved such a motion in a private anti-trust case, it would appear that Olsen's view is unfounded. *See also* Rutledge v. Electric Hose & Rubber Co., 511 F. 2d 668, 676 (9th Cir. 1975), which said: "[t]he fact finding process under a Rule 41(b) motion calls for an adjudication upon the merits of the plaintiff's claims and may involve a weighing of the evidence as it stands at the close of the plaintiff's case."

The district court drew permissible inferences based upon the record evidence. Moreover, as this court held in Rasmussen Drilling v. Kerr-McGee Nuclear Corp., 571 F. 2d 1144, 1148 (10th Cir.), *cert. denied,* 439 U.S. 862 (1978), "[a] choice between two permissible views is not 'clearly erroneous.' "

IV.

DID THE TRIAL COURT ERR IN DISMISSING OLSEN'S SECTION 2 SHERMAN ACT ATTEMPTED MONOPOLIZATION CLAIM AGAINST PROGRESSIVE?

Olsen argues that Progressive attempted to monopolize the Utah retail market in quality synthesizers, quality amplifers and quality electronic and acoustic

guitars. "Quality" was defined as guitars and amplifiers retailing for over $300 and synthesizers retailing for over $700.

To support a claim based on an attempt to monopolize plaintiffs are required to establish several items. First, they must demonstrate a dangerous probability of success. Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951); American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946); Swift & Co. v. United States, 196 U.S. 375, 396 (1905). Second, plaintiffs must prove acts in furtherance of the attempt, although thes acts need not be successful. Lorain, *supra*, at 153. Third, plaintiffs must demonstrate specific intent to monopolize. Times Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953); E. J. Delaney Corp. v. Bonne Bell, Inc., 525 F. 2d 296, 306 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976). Fourth, a relevant market, within which the attempted monopolization occurred, must be established.[1]

The district court dismissed Olsen's attempted monopolization claim because of its failure to establish

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[1]Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1348 (3d Cir. 1975); Bonne Bell, *supra*, at 305; George R. Whitten, Jr., Inc. v. Paddock Pool Builders, 508 F.2d 547, 550 (1st Cir. 1974), *cert denied*, 421 U.S. 1004 (1975); Acme Precision Prods., Inc. v. American Alloys Corp., 484 F.2d 1237, 1240 (8th Cir. 1973); Bernard Food Indus., Inc. v. Dietene Co., 415 F.2d 1279, 1284 (7th Cir. 1969), *cert denied*, 397 U.S. 912 1970); United States v. Chas. Pfizer & Co., 245 F. Supp. 737, 739 (E.D.N.Y. 1965); Becker v. Safelite Corp., 244 F. Supp. 625, 637 (D. Kan. 1965). *But see*, Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) ("the relevant market is 'not in issue' in an attempt or conspiracy to monopolize case").

two of the aforementioned requisites, to-wit, dangerous probability of success and relevant market.

With regard to dangerous probability of success the district court said:

> [P]laintiff's own expert, Mr. Scott Lloyd, testified that the information submitted in this case did not show Progressive's percentage share of the market. Without this, the court is unable to make any finding as to the dangerous probability that Progressive could monopolize the market.

A review of the record reveals that there was no such dangerous probability of monopolization by Progressive. In fact, Progressive's efforts to control market share by causing manufacturers not to ship products to Olsen were consistently thwarted by Olsen's ready resort to an alternative source of supply: other dealers. The likelihood that monopolization would occur was very remote because Olsen showed himself to be a very aggressive competitors.

With regard to Olsen's failure to establish a relevant market, the district court stated that Olsen had failed to prove a relevant product market "composed of a unique set of products, distinguishable from products selling for less money. In short, the plaintiffs failed to show that the products included in the market definition were not 'resonably interchangeable' and competitive with less expensive products." (Quoting United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377, 395 (1956). Due to the fact that a "sufficiently discreet and separable product market" had not been defined, the trial court concluded that it could not "gauge the defendants' potential for inflicting economic harm."

Even if Olsen had adequately delineated a relevant product market, he nevertheless failed to prove that Progressive had a controlling position in that market. Indeed, the absence of proof of market share was emphasized throughout the record.

Olsen contends, however, that evidence of market share was introduced, namely, Utah sales of CBS Fender and Rhodes products. This contention is misleading. It was introduced not to demonstrate market share, but rather to show that Progressive was "cherry-picking," that is, picking a manufacturer's type "A" product without having to pick and promote his full line. Moreover, the exhibit offered by Olsen as proof of market share concerns but a subset of the relevant product market in issue. The relevant product market was all quality guitars, amplifiers, and synthesizers. The CBS sales study offered by Olsen encompasses, of necessity, only CBS products. Therefore, it cannot serve as evidence of market share. To be sure, the study could, after a few calculations, yield evidence of total market share if CBS's own share of the Utah market had been established, which it was not. Olsen's expert witness responded "No" to the following questions: "Can you give me an approximation that CBS had 30 percent of the market, 10 percent of the market in 1974 or 70 percent? Can you tell me that far?"

In light of the foregoing, we conclude that the trial court's findings were not clearly erroneous. Accordingly, the dismissal of Olsen's attempt to monopolize claim should be affirmed.

V.

DID THE TRIAL COURT ERR IN DISMISSING OLSEN'S SECTION 2 SHERMAN ACT CONSPIRACY TO MONOPOLIZE CLAIM AGAINST PROGRESSIVE?

The elements needed to establish conspiracy to monopolize are as follows:

First, the existence of a combination or conspiracy to monopolize. *American Tobacco, supra,* at 788.

Second, overt acts done in furtherance of the combination or conspiracy. Cullum Elec. & Mechanical, Inc. v. Mechanical Contractors Ass'n. of South Carolina, 436 F. Supp. 418, 425 (D.S.C. 1976), *aff'd,* 569 F. 2d 821 (4th Cir. 1978).

Third, an effect upon an appreciable amount of interstate commerce. United States v. Yellow Cab Co., 332 U.S. 218, 225 (1947); *Times-Picayune, supra,* at 611.

Fourth, a specific intent to monopolize. *American Tobacco, supra,* at 809.

A relevant market need not be established. Salco Corp. v. General Motors Corp., 517 F. 2d 567, 576 (10th Cir. 1975) ("specific intent to monopolize is the heart of a conspiracy charge, and a plaintiff is not required to prove what is the 'relevant market' ").

The district court based its dismissal of Olsen's conspiracy to monopolize claim on two factors. First, Olsen did not establish that the conspiracy of Progressive involved an appreciable part of interstate commerce. The only part of commerce which could conceivably be affected by such activity is the CBS Fender line. Progressive already had a monopoly on that line under an arrangement which the court had previously found was not *per se* illegal under Section 1.

The trial court also dismissed Olsen's conspiracy claim on the basis that Progressive did not harbor a specific intent to obtain a complete monopoly in all lines of musical instruments. The court observed that the evidence indicated only that "Progressive held exclusive franchises on certain product lines and may have prevented others from obtaining business on those lines."

We conclude the trial court's findings were not clearly erroneous. The dismissal by the trial court of the conspiracy to monopolize claim is affirmed.

VI.

DISCUSSION OF OLSEN'S BOYCOTT THEORY.

The trial court found that Progressive had conspired with CBS and Bobbie Herger to boycott Olsen, whereby he would not be able to obtain CBS products. This boycott was an element of the price fixing conspiracy also alleged engaged in by Progressive and Herger. The trial court said, "it was necessary to boycott Olsen in order that high prices set by Progressive and Herger could be maintained and not be undercut by Olsen."

The argument of Progressive on cross-appeal is that the trial court improperly treated the group boycott involved herein as a *per se* violation of the anti-trust laws. United States v. Realty Multi-List, Inc., 629 F. 2d 1351, 1367 (5th Cir. 1980). Progressive contends that a group boycott is not deemed a *per se* violation if it is "at least potentially reasonably ancillary to joint, efficiency-creating economic activities. (Quoting Realty *Multi-List, supra*).

In this case there is evidence that there was a boycott which was "clearly exclusionary or coercive in nature." Gould v. Control Laser Corp., 462 F. Supp. 685, 691 (M.D. Fla. 1978), *aff'd*, 650 F 2d 617 (1981). Thus, the case differs from those in which "courts have circumvented the rigidity of the *per se* rule by reasoning that the need for its application 'depends not upon a finding that * * * [a restraint] constitutes a boycott' but upon an analysis of its purpose and competitive impact.' " Note, The Facial Unreasonableness Theory: Filling the Void Between Per Se and Rule of Reason, 55 St. John's L. Rev. 729, 750 n. 155 (1981) (quoting *Gould, supra*, at 691). Pro-competitive impacts or motives within the trial court's findings are difficult to see. For instance, Herger boycotted Olsen because "she had an independent prejudice against giving competitive dealers large discounts." In addition, Progressive harbored a "predatory intent toward competing dealers."

From the findings it would appear that the boycott engaged in by Progressive was *per se* violative of the anti-trust laws. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (*per se* violation of Sherman Act exists when department store conspires with appliance manufacturers and distributors to prevent sales to small retail appliance stores).

Based upon the proposition that Progressive had violated Section 1 of the Sherman Act by conspiring to boycott Olsen from receiving CBS products, the trial court assessed damages at $4,303 before trebling. In calculating these damages, 1975 was used as a base year but by that time the boycott had been terminated, thus giving Olsen free access to CBS products. The damage study employed by the court then projected

backwards from 1975 to estimate the amount of damages that the boycott had caused. More specifically, the study reduced Olsen's total retail CBS sales for 1975 (stipulated to be $27,000) to a wholesale price figure, compared this figure with equivalent figures for CBS dealers in the state to determine Olsen's share of the CBS market in Utah for 1975, and then calculated the amounts Olsen would have earned if he had enjoyed the same market share in previous years. The projections of market share were reduced by 30%, however, to account for changes in Olsen's business operations, between 1971-1974 and 1975. The preceding damage analysis as worked out by the court is appended to this opinion.

The court determined that Olsen had suffered net lost profits of $4,303 from the years 1971 to 1974. Pursuant to 15 U.S.C. § 15, this figure was trebled to $12,909.

The calculations were derived, with one significant exception, from a damage study introduced into evidence by Olsen. The exception was that, unlike the damage study, the court did not assume that Olsen's increase in market share in 1975 (the base year) was due solely to the termination of the boycott. The court noted that in 1975, "Olsen was operating in a substantially different mode than during most of the damage period." Olsen had converted from a part-time to a full-time business and had, by moving to a larger store, doubled his floor space. Accordingly, the court diminished the 1975 sales base by 30% to reflect the role of the extra hours and space.

On appeal, Olsen argues that the damages awarded were too low, while Progressive asserts that the evidence does not sustain any award for damages. Olsen's

first contention is that the 30% reduction is improper. Olsen argues that he would have moved and switched to full-time operations well before 1975 if the boycott had not been in effect. For that he maintains that it was wrong for the trial court to reduce damages in an arbitrary manner on account of Olsen's very failure to move.

The trial court considered as "too speculative" Olsen's contention that he would have altered his business operations but for the boycott. The court is referring to Olsen's contention that he would have altered his business operations but for the boycott. It is true that a plaintiff in an anti-trust case should "not be held to a rigid standard of proof regarding the amount of damages, since in such cses economic harm is frequently intangible and difficult to quantify." King & King Enterprises v. Champlin Petroleum Corp., 657 F. 2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982), citing Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-65 (1931). On the other hand, "damages may not be merely speculative." *King & King, supra.*

Evidence in the record provided a reasonable basis for the court's determination. That is that Olsen's failure to alter his business operations in 1971-1974 was not due to his inability to obtain musical instruments. Olsen testified that, except for several delays which could well have been caused by order backlogs, he was able to obtain instruments from other dealers, if not from the manufacturers themselves. Also, Olsen was employed during that period by the Federal government. As this employment provided the bulk of Olsen's income, it is reasonable to conclude that the fear of losing a secure source of income, as opposed to an in-

ability to obtain musical instruments, prevented Olsen from taking up his music store business on a full-time basis.

Olsen also contends that the trial court was incorrect in applying a 30% reduction formula. According to Olsen, the reduction should have been applied only to estimated 1971-1974 sales, not to actual sales.

However, Olsen's math is wrong. The 30% reduction considers the fact of reduced floor space and selling time in the years 1971-1974 (as opposed to the base year of 1975). Floor space and selling time is essential to sales of actual and hypothetical musical instruments. Space and time devoted to hypothetical sales cannot be devoted to actual sales. Accordingly, the 30% reduction in both actual and estimated sales does not seem unreasonable in order to deal with Olsen's change in business operations between 1971-74 and 1975.

Progressive argues on cross-appeal that the evidence cannot sustain an award of damages to Olsen of any amount. The trial court, however, gave careful scrutiny to the entire picture and had no trouble finding that Olsen had sustained his burden of proof as to injuries suffered. The court said that "[i]nferences can be drawn that the boycott conspiracy foreclosed at least two avenues of supply, Herger and Browne [owner and operator of California Musical Instruments], from which injury occurred." The trial court also concluded that Progressive had not established that other sources of supply fully compensated for the foreclosure of Herger and Browne.

In view of these findings, this court should uphold the award of damages. *See King & King, supra,* at

1158 ("once there is found to be sufficient factual evidence of damages, the plaintiffs are not obligated to establish the quantum of damages 'with mathematical precision.' ") (Quoting Cackling Acres, Inc. v. Olson Farms, Inc., 541 F. 2d 242, 246 (10th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977). *See also* Trabert & Hoeffer, Inc. v. Piaget Watch Corp., 633 F. 2d 477, 484 (7th Cir. 1980); Woods Exploration & Producing Co. v. Aluminum Co. of America, 509 F. 2d 784, 792-93 (5th Cir.), *cert. denied,* 423 U.S. 83 (1975); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 346 F. 2d 661, 666 (6th Cir.), *cert. denied,* 382 U.S. 904 (1965).

VII.

DID THE TRIAL COURT ERR IN DENYING OLSEN'S PRICE FIXING CLAIM?

The trial court found that Progressive and Herger had agreed to divide territories and to fix high retail prices on CBS products in violation of Section 1 of the Sherman Act. The trial court, however, refused to award damages on this conduct, based upon its conclusion that the conspiracy had not damaged Olsen. The court observed that "[l]ogically, the higher the prices set by Herger and Progressive, the easier it was for Olsen to compete in the Utah retail market for CBS products."

High fixed prices might facilitate the entrance of new competitors into a relevant product market, or may help the competitive position of sellers not participating in the price fixing conspiracy. Nevertheless, it is clear that such beneficial features cannot render a price fixing conspiracy immune from anti-trust attack.

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 650 (1980). Indeed, price fixing agreements are *per se* violative of Section 1 of the Sherman Act. *Catalano, supra*, at 648; United States v. Container Corp. of America, 393 U.S. 333, 337 (1969); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n. 59 (1940); *King & King, supra*, 1151.

However, the violation should not give rise to "double liability trebled." City and County of Denver v. American Oil Co., 53 F.R.D. 620, 631 (D. Colo. 1971). Olsen's price fixing damage theory would do just that. Olsen's damage calculations are as follows:

Progressive's CBS market 1971-1974 from the business records of CBS and Progressive	$297,709	1
Guitar City 70% of Progressive's CBS market, but for the conspiracy	208,396	2
Wholesale of Guitar City CBS market at benchmark, 50% of list cost	104,198	3
Guitar City retail sales CBS 70% market, at their normal discount, or 85% of list	177,137	4
Guitar City gross profit CBS 70% market, line 4 minus line 3	72,939	5
Minus 10.65% variable overhead expenses, of line 2	22,194	6
Minus awarded boycott damages	4,303	7
Net economic loss	46,442	8
Trebled damages	139,326	9

The weakness of this formula is that it compensates for the same transactions that have already been addressed by the trial court's award of boycott damages.

Line 2 of the derivation assumes that Olsen would have had 70% of Progressive's CBS market but for the conspiracy. An identical assumption, although phrased in terms of Olsen's potential share of the entire Utah CBS musical instrument market (as opposed to his share of Progressive's market) was made with respect to Olsen's boycott damages (see line 4 of trial court's boycott damage formula). So, therefore, the same injury is being counted up twice. Accordingly, the trial court properly declined to award both boycott and price fixing damages where they stemmed from the same transactions.

VIII.

WHAT ABOUT THE CONTENTION THAT SOME OF THE MORE SIGNIFICANT TRIAL TRANSCRIPTS WERE MISSING?

Olsen asserts on appeal that trial transcripts which were favorable to his position were not before the trial court during the decision making process. Thus, according to Olsen, the court failed to make certain findings, made erroneous findings, failed to understand Olsen's economic theories, failed to award price fixing damages, failed to award reasonably proved boycott damages, and failed to draw inferences in favor of Olsen.

Almost every page of the neglected transcripts contains testimony which the trial court was privy to during each and every day of the trial below. This element, plus the fact that the court had available to it the bulk of the trial transcripts, all of the pleadings and all of the trial exhibits, certainly gave the court the basis for reaching an accurate conclusion. A care-

ful review of the neglected transcripts does not reveal reversible error by the trial court. *See* United States v. Lee, 622 F. 2d 787, 791 (5th Cir. 1980), *cert. denied,* 451 U. S. 913 (1981) (although the district court failed to review the entire record, it had "adequately informed itself of the record * * * to make the determination required"); Simpson Bros. v. District of Columbia, 179 F. 2d 430, 436 (D.C. Cir. 1949), *cert. denied,* 338 U.S. 911 (1950) (although the district court had not read all the pleadings in the case, "the record * * * and the opinion of the district court show that by the end of the hearing on the motions for summary judgment the court was acquainted with the issues in the case and that the conclusion reached by the court was — in view of all the pleadings, deposition, affidavits and authorities — correct.").

Olsen maintains on appeal that certain evidence was improperly excluded from the record. Progressive claims that other testimony was improperly received into evidence. The trial court's rulings on these matters did not prejudicially affect the outcome of the litigation. See Union Carbide and Carbon Corp. v. Nisley, 300 F. 2d 561, 586 (10th Cir. 1961), appeal dismissed, 371 U.S. 801 (1962); Fed. R. Civ. P. 61.

In light of what appears above, it is the conclusion of this court that the judgment of the trial court should be and it is hereby affirmed.

APPENDIX B

[¶ 64,928] Clair Olsen and Guitar City Studios, Inc. v. Progressive Music Supply, Inc., Acoustic Control Corp., Ovation Instruments, Inc., Norlin Music, Inc., formerly Chicago Musical Instruments,[1] Columbia Broadcasting Systems, Inc., and Peavey Electronics Corp.

U. S. District Court, District of Utah, Central Division. No. C 75-153. Filed June 26, 1981.

Sherman Act

Price Fixing—Division of Territories—Agreements Between Competitors—Retail v. Wholesale Price Fixing—Damages. — An agreement between two competing authorized musical instrument dealers to fix retail prices and divide territories constituted a *per se* violation of Sec. 1 of the Sherman Act. However, a competing unauthorized dealer showed no evidence of a conspiracy to fix wholesale prices or to set a discount that the unauthorized dealer should have been given. In light of its other sources of supply that could be used to purchase instruments at a discounted price, the unauthorized dealer was not damaged by the price fixing agreement. See ¶ 3050.66, 4630.72.

Refusal to Deal—Denial of Dealership—Business Reasons—Musical Instruments. — A musical instrument distributor's denial of a dealership to a retailer

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[1]The original version incorrectly indicated Chicago Musical Instruments as a division of Columbia Broadcasting System, Inc. The Words "a division of" have been omitted in the amended version.

was premised on the distributor's independent business reasons and was not the result of a conspiracy between the distributor and an existing dealer. The retailer did not have any repair facilities, which the distributor strongly favored, no evidence was shown that the dealer knew of a proposed dealer agreement with the retailer, and the retailer began operating on a full-time basis very late in the relevant time period. See ¶ 2420.

Boycotts — Forcing or Inducing Adherence — Enforcement of Restrictive Dealer Contracts — Complaint by Dealers — Price Fixing. — Creation of credit problems for dealers, temporary supply cutoffs, and tracking of instrument serials numbers to enforce a musical instrument distributor's policy disfavoring transshipment of its products to unauthorized dealers, as a result of an agreement with a complaining authorized dealer, evidenced a conspiracy to boycott an unauthorized dealer. A price fixing agreement between the complaining dealer and a competitor also established the boycott, because, as a further step of the agreement, it was necessary to boycott the unauthorized dealer so that the high prices set by the competing dealers could not be undersold. The second dealer was in a different market area from the unauthorized dealer and might have been amenable to dealing with the unauthorized dealer, but it had previously had its instrument supply temporarily terminated for noncompliance with the price fixing agreement. Statements by the distributor and the complaining dealer establishing predatory intent were also shown by the unauthorized dealer. See ¶ 2460, 2480.

Private Suits — Damages — Market Share in Base Year — Market Forces — Change in Operations — Musical Instrument Industry. — Damages to an unauthorized musical instrument dealer, as a result of a con-

spiracy between two competing dealers and their distributor were based upon the unauthorized dealer's market share of the distributor's products in the relevant market in 1975, when it had free access to the products. That share was related back over the damage period. Uncertainty arising from direct evidence of the extent that the conspiracy prevented the unauthorized dealer from buying all the products it otherwise would have was a burden the conspirators had to clarify or bear. Fluctuations in demand for the instruments, the distributor's difficulty in keeping up with demand, emergence of competing brands, and market productivity in general were factors considered in determining the amount of damages. The facts that the unauthorized dealer switched from part-time to full-time selling and moved to a new, larger store during the relevant period also affected the award. See ¶ 9302.

For plaintiffs: Lyle J. Barnes, Kaysville, Utah, Lowell V. Summerhays, Salt Lake City, Utah. For defendants: Stephen G. Crockett, Salt Lake City, Utah, Richard W. Giauque, of Giauque & Williams, Salt Lake City, Utah, Robert A. Mackey, Los Angeles, Cal., E. Scott Savage, Salt Lake City, Utah, Bryce E. Roe, Salt Lake City, Utah.

Amended*

Findings of Fact and Conclusions of Law

ANDERSON, D. J.: After four years of discovery and motions and a non-jury trial of twenty-seven days that spanned one and one-half years, this case is now ready

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*On April 13, 1981, the court held a hearing at which defendant Progressive orally moved to amend the court's Findings of Fact and Conclusions of Law, which were entered herein on April 3, 1981. The basis of the motion was that

for final decision. During the pendency of this action all of the defendants have been dismissed from the case, either by stipulation or by order of the court, with the exception of defendant Progressive Music Supply, Inc. (Progressive). On November 3, 1975, the parties stipulated to, and the court ordered, the dismissal of defendant ARP Instruments, Inc. On December 11, 1975, the court ordered that defendant CBS Musical Instruments be dismissed without prejudice. At the close of plaintiffs' case on June 12, 1979, the court dismissed Ovation Instruments, Inc., and Norlin Music, Inc. And in the court's order dated May 22, 1980, [Order Granting in Part Defendants' Motion to Dismiss Under Rule 41(b)], defendants Peavey Electronics Corp. and Acoustic Control Corp. were dismissed.

The May 22, 1980, order also narrowed the issues that remained for the presentation of defendant Progressive's case. It dismissed all of plaintiffs' Sherman Act § 2 claims and dismissed plaintiffs' § 1 claim, except as against Progressive to the extent it involved CBS Musical Instruments and Bobbie Herger. There-

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certain factual errors appeared in the original version. The court invited counsel to submit the motion in writing with supporting and opposing memoranda relating to the impact, if any, the corrections would have on the Conclusions of Law and Judgment. Olsen filed a motion on April 24, 1981, entitled, "Motion to Amend and for Additional Findings of Fact and Conclusions of Law and for Entry of New Judgment Pursuant to Rules 52 and 59, Federal Rules of Civil Procedure." Memoranda on the motions have now been filed with the court. Corrections have been incorporated into the amended version, and are indicated by footnote, together with any effect the correction has on the court's decision. Additional findings and conclusions have also been made as indicated.

fore, the basic issue remaining to be resolved was whether Progressive was liable to plaintiffs for illegally conspiring to restrain trade or commerce in violation of Section 1 of the Sherman Act and, if so, the extent of the damages suffered by plaintiffs.

On November 12, 1980, the trial of these final matters began with the further presentation of plaintiffs' evidence regarding damages. Progressive then presented its case, concluding on November 18, 1980, on which date final arguments of counsel were heard. Plaintiffs were represented by Lowell V. Summerhays, and Progressive was represented by Stephen G. Crockett. The court granted counsel leave to file final briefs, and the same having been received, the matter is finally submitted.

Briefly summarzied, the parties' claims are as follows: Plaintiffs claim that Progressive conspired with CBS Musical Instruments and/or Bobbie Herger and others to establish Progressive as the exclusive dealer for CBS products in Utah, to fix prices, to terminate plaintiffs as a CBS dealer, and to boycott plaintiffs from receiving CBS products. Plantiffs further claim that they were damaged in their business and property primarily through the loss of sales they should have had but for the conspiracy. Progressive denies any violation of Section 1 of the Sherman Act, either by price fixing or boycott, and denies that plaintiffs have been damaged as a result of any conduct by Progressive. Progressive also disagrees with plaintiffs' method of formulating damages.

Pursuant to rule 52(a) of the Federal Rules of Civil Procedure, the court enters the following Findings of Fact and Conclusions of Law, reflecting the court's

determination that plaintiffs have established by a preponderance of the evidence that Progressive conspired illegally to restrain trade or commerce in violation of Section 1 of the Sherman Act.[2]

Findings of Fact

1. At all times relevant herein, plaintiff Clair Olsen has been engaged in the retail sale of musical instruments, amplifiers, public address systems, and accessories in Kaysville, Utah until early 1975, when he moved his place of business to a larger store in Kaysville. (Transcript, Vo. VIII, p. 1893-96). Prior to April 2, 1974, Olsen operated his business on a part-time basis. (Transcript, Vol. VIII, p. 1890). After he went full-time and after he moved to the larger store, the business's sales volume increased substantially.[3] Olsen engaged in business as a sole proprietor to February 24, 1975, when he caused the organization and incorporation of plaintiff Guitar City Studios, Inc. Since that time, he has been carrying on the same business as principal officer and sole shareholder of Guitar City. They interests of Olsen and Guitar City in this litigation are joint (and hereinafter plaintiffs will be collectively referred to as "Olsen").

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[2] The original version found no conspiracy to boycott. On further reflection, the court has determined that the evidence shows a conspiracy between Progressive, CBS, and Herger to boycott Olsen from receiving CBS products from Progressive, Herger, and Browne.

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[3] The first two sentences of this paragraph in the original version erroneously stated that Olsen moved his business to the Centerville store in May of 1974, and that he began operating his business on a full-time basis in February of 1975.

2. Defendant Progressive Music Supply, Inc. ("Progressive") is a Utah corporation engaged in the retail sale of musical instruments, amplifiers, public address systems, accessories, and related items. It has retail stores in Ogden, Provo, and Salt Lake City, Utah. Don Penman is the primary owner and operator of Progressive.

3. CBS Musical Instruments ("CBS") is an operating subdivision of Columbia Broadcasting Systems. CBS manufactures and distributes musical instruments that are sold throughout the United States including the State of Utah. At all times relevant herein, Robert P. Bull was a vice president for CBS; Margaret Current was secretary to Robert Bull from approximately 1974 to 1975, and later worked for Doug Browne.

4. Mrs. Bobbie Herger ("Herger") is the owner and operator of Herger's Music Store in Provo, Utah.

5. Doug Browne, at times relevant herein, owned and operated California Musical Instruments.

6. The businesses of CBS, Olsen, Progressive, Herger, and Browne involved interstate commerce.

7. The Complaint in this action was filed on April 18, 1975.

[*Price Fixing*]

8. Commencing sometime in 1967, Penman and Herger agreed to fix retail prices on CBS products at prices higher than on the CBS price list. The agreement included a division of territories. The agreement continued until February of 1973. (Transcript, Vol. I,

pp. 178-83; 189-92). Mrs. Herger testified that in late 1972 she contacted CBS about her price-fixing arrangement, and that she was told she could sell the products at whatever price she desired. She testified that she waited until February because CBS wanted to get in touch with Penman and "work it out" with him. (*Id.* pp. 190-91). This leads to the inference that CBS wanted to obtain Porgressive's approval before allowing Herger to break the price-fixing agreement. The evidence shows that in the late 1960's "pressure was brought to bear" by CBS representative Bud Driver to enforce compliance with the price-fixing arrangement. (*Id.* pp. 169-71).[4] In February of 1973, she then lowered her prices, in some instances below the CBS list price. She was not contacted thereafter by Penman regarding prices. (Transcript, Vol. I, p. 192).

9. There is no believable evidence that Herger and Penman ever discussed fixing wholesale prices, or more specifically, whether Olsen should be given a discount at any particular rate. Nor was there any evidence of an agreement to that effect. Mrs. Herger testified that she had a unilateral and independent prejudice against giving competitive dealers large discounts. (Transcript, Vol. I, pp. 207; 223-26). On May 4, 1972, Olsen purchased one Fender guitar from Herger for resale to a customer of his. (Ex. A-4). The guitar was sold at the Progressive retail list price and a 20% "commission" was paid to Olsen indirectly. (Transcript, Vol I, pp. 207-209, 215). Mrs. Herger testified that the transaction was handled in this way because CBS frowned on transshipping, and because of the pricing

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[4] The preceding three sntences have been addd to demonstrate CBS's protectionistic role with Progressive.

and territorial agreement with Progressive. (*Id.* at 215; 220-21).[5] Olsen never tried to purchase CBS instruments from Progressive. He testified, however, that Progressive always sold Olsen CBS parts when he needed them. (Olsen Deposition, Vol. III, p. 84).

10. Olsen had various sources of supply available to him through which he could purchase CBS instruments at wholesale at 60% of the retail list price during most of the relevant statutory period of April 18, 1971, to April 18, 1975.[6] (Transcript, Nov. 13, 1980, p. 206). It is unclear from any direct evidence the extent to which CBS products were unavailable to Olsen as a result of a boycott conspiracy in light of availability through other dealers.

11. Olsen was not damaged by the Herger-Progressive conspiracy to divide territories and to fix high prices. Logically, the higher the prices set by Herger and Progressive, the easier it was for Olsen to compete in the Utah retail market for CBS products.

[*Dealership Agreement*]

12. Progressive did not conspire with others to prevent Olsen from becoming a CBS dealer. There was evidence produced at trial that CBS had a file on Olsen. (Current Deposition, Vol. I, pp. 10-15). It was the practice of CBS to set up a file on any person where there were three or more pieces of correspondence re-

[5] The preceding three sentences were added to this amended version.

[6] The finding originally stated that the wholesale purchases could be made at a 60% discount; however, the court had in mind and intended to state that the wholesale purchase price was 60% of the retail list price or, in other words, a 40% discount.

lating to that person to justify a file. (*Id.* pp. 9-10). There is confusion in the Current deposition testimony concerning whether or not a dealer agreement in the name of Olsen was approved but not delivered. (Current Deposition, Vol. I, pp. 69-72, 84). Regardless of whether a dealer agreement was approved or not approved, Olsen has failed to produce evidence that preponderates in favor of believing that Progressive had any knowledge of the proposed dealership agreement or any involvement in Olsen's being denied a CBS dealership. The court finds that CBS had a policy during the times relevant which strongly favored dealers of CBS having their own repair facilities so that CBS customers could be given proper service. (Current Deposition, Vol. I, p. 35). During the period from 1971 to May of 1974, Olsen had no service facilities. (Transcript, Vol. II, p. 1724). Furthermore, it was not until April of 1974 that Olsen began operating his business on a full-time basis.[7] No other authorized dealers were appointed during the same period. It is reasonable to infer from the above facts that the denial of a dealership to Olsen was premised on CBS's independent business reasons and not on any conspiracy between CBS and Progressive, and the court so finds.[8]

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[7] This sentence was changed from the original to reflect correctly that Olsen went full-time in April of 1974, not in February of -1975.

[8] In the original version the last two sentences of this paragraph incorrectly stated that Olsen became a CBS dealer in 1975. In fact, Olsen has never been an authorized CBS dealer. The court mistakenly reached this conclusion because 1975 was the first year in which Olsen was able to acquire freely CBS products. This inadvertence by the court should in no way alter its decision on this point because the court's analysis, as based on this assumption, went only to the idea that he was able to more freely obtain products during and after 1975.

13. Progressive did not conspire to terminate Olsen as a dealer of CBS products. Olsen never became an authorized CBS dealer.[9]

[*Boycott*]

14. During at least part of the relevant period herein (specifically in 1972), CBS had a policy that its dealers were not to resell CBS products at wholesale to dealers not authorized by CBS. Margaret Current testified that Mr. Bull generally advised dealers that while CBS could not control where merchandise went after it was sold to authorized dealers, CBS would prefer that it not be sold to unauthorized dealers. (Current Deposition, Vol. I, pp. 47-48). However, the 1972-1973 CBS Fender authorized dealer agreement states: "2. Dealer agrees . . . . g. to resell Fender products at wholesale only to dealers who are authorized by Fender to sell Fender products." (Trial Exhibit P-186). Current stated that on occasion, CBS had traced serial numbers of CBS instruments from unauthorized dealers back to the authorized dealer who had transshipped the item. (*Id.* pp. 56-58). Mr. Bull testified similarly, adding that the service center did most of the tracing. (Bull Deposition, 46-47). The inference can be drawn that CBS's purpose in tracing serial numbers was to exert pressure on those dealers who were violating CBS policy.

There is also some evidence that CBS exerted pressure on transshipping dealers by creating "nonexistent credit problems" which had the effect of temporarily cutting off their supply of CBS instruments. (Current

[9] The original version erroneously stated that Olsen became an authorized CBS dealer in 1975. See footnote 8, supra.

Deposition, Vol. I, pp. 61-64). However, Current testified that she was unaware of any dealer who had his dealership terminated because of his willingness to transship. (Current Deposition, Vol. I, pp. 47-48). Furthermore, Doug Browne testified that if CBS had created any credit problems during the relevant period herein, those problems arose from the sale of a piano to a band in Wichita, Kansas. (Browne Deposition, Vol. V, pp. 1248-53).

The court finds that during the relevant period herein CBS had a policy that disfavored transhipment of CBS products to unauthorized dealers. The court further finds from the evidence that this was a nationally applied policy to protect individual CBS dealers such as Progressive and which was also based in part on the desire to minimize difficulties in handling warranty claims and to ensure that purchasers of CBS products had ready access to adequate repair service. (See Current Deposition, Vol. I, p. 59; Bull Deposition).

15. Progressive conspired with CBS and Herger to boycott Olsen from obtaining CBS products from Progressive, Browne, and Herger.[10] The court has found that an agreement existed between Progressive and Herger to fix CBS prices at levels higher than on the CBS price list, (see Finding No. 8). After careful reflection, the court finds that this agrement also ex-

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[10] The original version found no conspiracy to boycott. A further review of the evidence has compelled the court to the conclusion that Olsen has presented sufficient evidence, when viewed together in light of all the evidence presented at trial, to establish the conspiracy. A substantial revision of the original version Findings #15 and #16 has been made. New Finding #16 deals with damages arising from the boycot conspiracy.

tended to boycotting Olsen from obtaining CBS products. (Transcript, Vol. I, p. 215). As a further step of the conspiracy it was necessary to boycott Olsen in order that the high prices set by Progressive and Herger could be maintained and not be undercut by Olsen, who was selling CBS products at 85% of the suggested retail price.

The involvement of CBS in the conspiracy is made evident by Herger's testimony. She stated that the policy directing that she not resell Fender (CBS) products was "one and the same" with CBS and Progressive. (Transscript, Vol. I, p. 215). She further explained that the policy was one and the same "because I felt that Mr. Penman was dictating to Mr. Driver [the CBS representative for Utah] how things should run in Utah." (*Id.*) Herger stated that she handled the sale of one instrument to Olsen in the way she did, rather than in the traditional wholesale context, because of the price-fixing agreement. (Transcript, Vol. I, p. 220). She had previously had her supply of CBS instruments temporarily terminated for non-compliance with the price-fixing agreement. (*Id.* pp. 220-21).

Progressive has argued that Olsen never tried to buy CBS products from Progressive and only tried once with Herger. Nevertheless, the evidence has made clear that Olsen realized that such a request would be futile — as the one experience with Herger proved to be (in the sense that the difficulty involved and the high price charged by Herger made it unrealistic from a business standpoint to deal on that basis).

Both Progressive and Herger may have had their independent reasons for boycotting Olsen. Progressive was a direct competitor of Olsen and had a different

philosophy concerning pricing. Herger stated that she had an independent prejudice against giving competitive dealers large discounts. (Transcript, Vol. I, pp. 207; 223-26). Nevertheless, it is clear that Herger was in a different market area from Olsen so that she might have been amenable to deal with Olsen on occasion, but for the agreement with Progressive.

Doug Browne testified at the trial regarding a conversation with Robert Bull in early 1974 about Browne's shipment of CBS products to Olsen.

> Mr. Bull told me that he did not have the right to tell me who I could and could not sell to but that it was the desire of CBS to control its distribution through authorized dealers, at which time I said I had no desire to interrupt their distribution policies.
>
> So, he explained to me that based on dealings—
> Very briefly let me relate that: He told me that Clair Olsen was trouble. In fact, I believe the quote was "This guy is trouble."
>
> * * *
>
> Q. Did he elaborate on why he thought Clair Olsen was trouble?
>
> A. Not really. He just said that some of my merchandise had appeared there, and we didn't really get into it why or how he determined that some of my merchandise had appeared there, but the way that Fender traces the flow of their merchandise is known to most people, and they had evidently found that a serial number sold to me originally had appeared in Utah and that the logical way that it got there was by me selling it to Clair Olsen and that he would appreciate it if I would not interfere with their distribution policy,

> although again relating to me that he had no right to formally ask that, and at no time did he tell me not to sell to Clair Olsen.

(Transcript, Vol. V, pp. 1241-42). Browne also testified a few minutes later as follows:

> Well, as mentioned, in the discussion he advised me that Clair Olsen was not an authorized dealer and that he was trouble for authorized dealer or dealers that he had in the territory, and it was against his wishes that I sell them.

(*Id.* p. 1246). Browne also testified that the insinuation was made that if he continued to sell to Olsen, his supply would be cut off as before, so he stopped selling to Olsen for a period of one to one and a half years. (Transcript, Vol. V, pp. 1246-47). At that time, Herger and Progressive were the only authorized CBS dealers in Utah. After reivewing all the evidence together, the court is persuaded that Bull exerted pressure on Browne as a result of an agreement with Penman and as part of a broader policy to protect dealers such as Progressive. CBS's action toward Browne was consistent with CBS's actions toward him concerning similar sales on other occasions to dealers in other states. (See Daily Transcript, Vol. V, p. 1272, lines 1-3). This, however, does not significantly detract from the court's finding that CBS applied pressure to stop Browne from transshipping to Olsen pursuant to the wishes of Progressive.

[*Predatory Intent*]

As additional proof of the conspiracy, Olsen produced evidence at trial to prove that Progressive harbored a predatory intent toward competing dealers.

The inference Olsen would have the court draw from this evidence is that this predatory intent made it likely that Progressive conspired with CBS and other dealers to deprive Olsen of CBS products. The evidence in this regard involves four incidents. Concerning the first, Olsen testified that Penman telephoned him in 1972 and in effect threatened to put him out of business. However, he also testified that Penman said he did not intend to retaliate, but that Olsen should think things through carefully before proceeding with the lawsuit against Best. (Preliminary Injunction Transcript, pp. 40-41). Penman's testimony presented a different version — basically, that the conversation involved Penman's offer to help resolve a conflict between Olsen and Best. Olsen urges the court to draw an adverse inference against Progressive for its failure to call Best, who was present during the conversation and heard Penman's side of the conversation. Although Best's testimony may have cleared up some of the discrepancies, he was available as a witness to both parties and the court will not draw the adverse inference. On the whole, the court finds Penman's version to be more reliable. Even so, it does leave the court with some degree of evidence which might imply Penman had a predatory intent toward Olsen.

The second and third incidents presented by Olsen involved statements by Progressive to Jerrold McKean. In one, Penman indicated he was trying to get Fender guitars taken away from Mrs. Herger so that he could be the only major dealer in the area. In the other, he testified that Penman told him he was going to call the factory because evidently some guitars had been "shipped through by mistake" to Glenn Brothers Music. The court observes that McKean's testimony was impeached — revealing a prejudice against Penman arising

out of two lawsuits with Penman. (Transcript of May 4, 1979, pp. 9-12, 49-51). The fourth incident involves testimony of Michael Draper that he heard people at Progressive say that Progressive should stop buying products from ARP and Cerwin Vega because they were supplying Olsen. (Transcript, Vol. I, p. 2, lines 5-10; Transcript of April 30, 1979, pp. 71, 114). This last statement occurred after this suit was filed, however, and the record shows that during the relevant period, Progressive carried many of the same lines as Olsen. Furthermore, Olsen's own damage study shows that Progressive in fact continued to buy products from both ARP and Cerwin Vega after this incident occurred.

The above incidents do show a predatory intent on the part of Progressive, which lends support to many of the inferences drawn heretofore leading to the overall conclusion that a conspiracy to boycott Olsen existed among Progressive, CBS, and Herger. The scope of that conspiracy extended to prevent Olsen from obtaining product from at least Progressive and Herger during the damage period, and from Browne during a one and one-half year period beginning approximately in the spring of 1974.

[*Damages*]

16. Olsen has proposed a damage theory claiming lost profits caused by the boycott conspiracy. It is based upon Olsen's market share of CBS products in the Utah market during 1975, a base year in which Olsen had free access to CBS products. This share is then related back over the damage period years. The court finds the basic approach to be a reasonable one; however, several significant factors are not taken into account

by the proposed damage study. The court therefore adopts the study subject to the significant modifications described hereafter.

The court finds that Olsen has met his burden of proving the 'act of injury. Inferences can be drawn that the boycott conspiracy foreclosed at least two avenues of supply, Herger and Browne, from which injury occurred. It is true that Olsen was apparently able to purchase CBS products from many sources at discounts as large as 60% of the list price. Olsen bought CBS instruments during the 1971-1975 period from BGK Enterprises, California Music, Leo's Musical Instruments, Freeport Music, and Bobby Music. (Transcript, Vol. VII, p. 1778; Exhibits P-241 to P-244). It is unclear from direct evidence the extent to which the conspiracy prevented Olsen from buying all the CBS products he otherwise would have bought — especially in light of other avenues available to Olsen from which he could obtain CBS products. The uncertainty arising from this factor is a burden the defendants must either clarify or bear. *Bigelow v. RKO Radio Pictures, Inc.* [1946-1947 TRADE CASES ¶ 57-445], 327 U.S. 251, 265 (1946).

[*Market Forces*]

Several market forces were in effect during the times relevant herein. During the early 1970's CBS products were in extremely high demand, and the evidence showed that the manufacturer had a difficult time keeping up with the demand. In about 1974-1975 the demand began to slacken due to the emergence of several other brands which began to compete effectively with CBS products. The year 1975 was also a somewhat less productive year economically for the market-

place in Utah. These observations would tend to make Olsen's damage study more conservative in the sense that potential sales for the product were more likely during the damage period. However, the periodical shortness of supply would have made it more difficult to obtain products from other dealers who would naturally prefer to sell the same item at full retail if supply is limited. Since these factors have not been quantified in the evidence and have the effect of cancelling each other out, no adjustment is made for them.

Prior to April 2, 1974, Olsen operated his business on a part-time basis, primarily during peak business hours. (Transcript, Vol. VIII, p. 1890). In late 1974 or early 1975 he moved his business to a larger store in Kaysville, Utah, which more than doubled his space. (Transcript, Vo. VIII, pp. 1894-96). The move was in the same general location, several doors down the street. Thus, during the base year, 1975, Olsen was operating in a substantialy different mode than during most of the damage period. The damage study of Olsen (Exhibit 248) does not adjust for this significant factor. The reason given is that Olsen would have made such a move earlier if CBS products had been freely available to him. The court rejects this assumption as too speculative.

It is necessary, therefore, to assign a value to the increase in Olsen's business in 1975 which would be attributable to the larger store and to his going full-time. No direct evidence on this point was introduced at trial. It is reasonable to infer, however, that these changes in operation must have had significant impact upon the business. In assessing the value of such impact, the court gives weight to the following factors: 1) Olsen had a viable business in operation with a developing clientele before the move; 2) selling time and

display space were basically doubled within the same basic location, and 3) other factors, except the boycott conspiracy, remained about the same. The court deems it a conservative estimate that 30% of total sales in the business in 1975 was attributable to the extra hours worked and the larger space of the new location. Accordingly, the sales of the base year, 1975, are diminished by 30% to reflect the role of the extra hours and space.

Another assumption of the damage study is that, but for the conspiracy, Olsen could have obtained CBS products at the authorized dealer cost, which was 50% of the retail list price (See Transcript, November 12, 1980, p. 102). This assumption is not supported by the evidence. Accordingly, an adjustment is made in the damage study to reflect that Olsen's purchases during the damage period would have been at 60% of list rather than 50%. This is accomplished by omitting lines 7 and 8 from Exhibit A-30.

The court finds that Progressive's Exhibit A-30 is the most accurate embodiment of Olsen's damage theory — as far as it goes — and therefore the court uses this exhibit as a reference point to make the above noted adjustments. This exhibit correctly employs 1975 *sales* of CBS products by Olsen (rather than purchases), which the parties stipulated were $27,000 for that year.

With the above adjustments in mind, the court finds that the damages resulting from the boycott conspiracy are determined as follows:

	1971	1972 (Dollars)	1973	1974	1975 (Base Year)	Line Item No.
Total Purchases of CBS Instruments in the State of Utah other than Plaintiffs' at Whlse. Value	$ 97,234	$86,806	$88,410	$ 97,922	$68,348	1
Plaintiffs' Sales of CBS Instruments Adjusted to Whlse. Value	$ 6,456	$ 4,489	$ 5,717	$ 10,612	$15,882	2
Total CBS Instrument Market at Wholesale Value	$103,690	$91,295	$94,127	$108,534	$84,230	3
Guitar City's Estimated Share of the CBS Instrument Market at Wholesale Value (18.86%)	$ 19,556	$17,218	$17,752	$ 20,469	0	4
Less: Adjustment Factor of 30% to Reduce Base Year to Equivalent of Part-time Operation	.70	.70	.70	.70	0	4a
and Half as much Selling Space	$ 13,689	$12,052	$12,426	$ 14,328	0	4b
Less: Plaintiffs' Sale of CBS Instruments Adjusted to Wholesale Value (Same as Line Item #2 Above)	6,456	4,489	5,717	10,612	0	5
Wholesale Value of Sales Lost Line 4b minus Line 5)	$ 7,233	$ 7,563	$ 6,909	$ 3,716	0	6
Plus: Guitar City's Average Markup on Transshipment Market	.3665	.3665	.4660	.4478	.5677	9
Instrument Purchase	$ 2,651	$ 2,772	$ 3,220	$ 1,664	0	10
Retail Value of Lost Sales	$ 9,884	$10,335	$10,129	$ 5,380	0	11
Less: Purchases-Transshipment Market Value (Cost)	$ 7,223	$ 7,563	$ 6,909	$ 3,716	0	12
Less: Additional Variable Expenses (10.65%) (Reduced by 20% from Exhibit A-30 in Accordance with Adjustment in Lines 4a and 4b above)	$ 1,602	$ 1,556	$ 1,579	$ 1,277	0	13
Net Income Loss	$ 1,059	$ 1,216	$ 1,641	$ 387	0	14

An explanation of the line item numbers can be found in Plaintiffs' Brief Regarding Damage Proof, filed October 2, 1980.

The foregoing formula yields a net loss of profit for the years of 1971 to 1974 of $4,303.

Conclusions of Law

1. The court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. §§ 1, 2, 15 (1976) (the monopoly claims have been dismissed pre-

viously); 28 U.S.C. § 1331 (1976). The parties have stipulated in the Pretrial Order that the court has jurisdiction over them.

2. Venue is properly laid in the Central Division of this court pursuant to 15 U.S.C. § 22; 28 U.S.C. § 1391 (1976).

3. The running of the statute of limitations was tolled by the filing of this action on April 18, 1975, and the relevant statutory period began on April 18, 1971. See 15 U.S.C. § 15b.

4. The interstate commerce requirement of 15 U. S. C. §1 is met by the facts of this case because the business of CBS, Olsen, Progressive, Herger and Browne involve interstate commerce within the meaning of that section. See *Hospital Building Co. v. Trustees of Rex Hospital* [1976-1 TRADE CASES ¶ 60,885], 425 U.S. 738, 743-46 (1976); *U. S. v. Cadillac Overall Supply Co.* [1978-1 TRADE CASES ¶ 61,892], 568 F. 2d 1078, 1082 (5th Cir.), cert. denied, 437 U.S. 903 (1978).

5. Based on its finding that Progressive and Herger agreed to divide territories and to fix high retail prices on CBS products, the court concludes that Progressive thereby conspired to restrain trade or commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. ¶ 1 (1976). This is a *per se* violation since it involves price fixing. However, having found that Olsen suffered no injury as a result of the Progressive-Herger price fixing conspiracy, the court concludes that Olsen is not entitled to any damages on this conduct. See *Rea v. Ford Motor Co.* [1974-1 TRADE CASES ¶ 75,029], 497 F. 2d 577, 589 (3rd Cir. 1974).

6. In light of the court's findings that Progressive did not conspire with others to prevent Olsen from becoming a CBS dealer, or to terminate Olsen as a CBS dealer, the court rules that as to these various grounds Progressive has not violated Section 1 of the Sherman Act, and therefore is not liable for damages on these bases.

7. The court has found that Progressive conspired with Herger and CBS to boycott Olsen from receiving CBS products which caused Olsen to suffer a net loss of profits in the amount of $4,303 for the years 1971 to 1974.[11] The court concludes that Progressive thereby conspired to restrain trade or commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Under 15 U.S.C. § 15, Olsen is entitled to recover treble damages in the amount of $12,909 from Progressive, together with costs and a reasonable attorney's fee.

APPENDIX C

CONSTITUTIONAL AMENDMENT INVOLVED

The 5th Amendment provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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[11] This conclusion has been changed from the original to reflect the court's finding that Progressive is liable for damages arising from a conspiracy to boycott Olsen.

The 14th Amendment provides: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ;nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Section 1 of the Sherman Act 15 U.S.C. § 1, provides: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2 of the Sherman Act 15 U.S.C. § 2 provides: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine of not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

Section 43(a) of the Lanham Act 15 U.S.C. 1125(a), provides: (a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or represen-

tation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

28 U.S.C. 1338 provides "(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws."

RULES INVOLVED

Rule 8(e) provides: (2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Rule 41(b) provides: For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 52(a) provides: (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58, and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the ex-

tent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusion of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

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APPENDIX D

WHOLESALE SALES VOLUME TO UTAH DEALERS OF FENDER AND RHODES PRODUCTS

	1973	1974	1975	1976	1977	Totals
		———— (Dollars) ————				
	(1)	(2)	(3)	(4)	(5)	(6)
Herger Music	$11,269	$18,719	$12,345	$ 7,574	$ 2,847	$ 52,754
Progressive Music	55,523	66,358	41,560	42,096	14,574	220,111
Cal's Music Box	—	—	—	5,614	5,603	11,217
Hart Brother	—	—	—	53,190	26,962	80,152
Lynn's Music	—	—	—	—	4,802	4,802
TOTALS	$66,792	$85,077	$53,905	$108,474	$54,788	$369,036
Progressives % of Total	83.13%	78%	77.1%	38.81%	26.6%	59.64%

Source: Year End Report, "Fender Domestic Sales In Dollars by Territory," 1973-1977.

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CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has caused to be served three (3) copies of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, upon the following counsel of record:

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JUN 15 1983

DATED this .... day of ...., 1983.

Lowell V. Summerhays

No. 82-2077

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah Corporation,

Petitioners,

vs.

PROGRESSIVE MUSIC SUPPLY, INC., NORLIN MUSIC, INC., formerly CHICAGO MUSICAL INSTRUMENTS, and PEAVEY ELECTRONICS CORPORATION,

Respondents.

BRIEF OF RESPONDENT PEAVEY ELECTRONICS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN SUPPORT OF MOTION OF RESPONDENT PEAVEY ELECTRONICS CORPORATION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 49.2

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QUESTIONS PRESENTED

The questions presented below reflect the issues arising with respect to respondent Peavey Electronics Corporation. The issues raised by petitioners with respect to all other parties are separate and distinct from those alleged against Peavey Electronics Corporation, and are not addressed by this brief.

I. Whether the petition for writ of certiorari fails to comply with Supreme Court Rule 17.1 by failing to state any special and important reasons for review of this action by the Court.

II. Whether the petition for writ of certiorari actually, in good faith, states a perceived conflict among the Circuits, or whether Petitioner has frivolously contrived a "conflict" by misreading his own cited precedent and ignoring the findings of the trial judge.

III. Whether the petition for writ of certiorari actually, in good faith, states a perceived departure from the accepted and usual course of judicial proceedings in the trial and appeal process by the lower courts, or whether petitioner has frivolously made such allegations to this Court.

IV. Whether the instant petition for writ of certiorari is frivolous as defined by Supreme Court Rule 49.2, and, if so, whether respondent is entitled to damages.

DESIGNATION OF CORPORATE RELATIONSHIPS

Peavey Electronics Corporation was incorporated under this name, it is not owned by any other corporation, does not have an ownership interest in any subsidiaries, and does not have any affiliates.

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No. 82-2077

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OPINIONS AND JUDGMENTS BELOW

The trial judge's Order Granting in Part Defendants' Motion to Dismiss Under Rule 41(b) is reproduced in Appendix A. The opinion of the United States District Court for the District of Utah is reported at 1982-2 Trade Cas. ¶64,928 (D. Utah 1981) and is reproduced in Appendix B to the Petition for Writ of Certiorari. The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 703 F.2d 432 (10th Cir. 1983) and is reproduced in Appendix A to the Petition for Writ of Certiorari.

STATUTES AND RULES RELEVANT TO BRIEF IN OPPOSITION AND MOTION FOR DAMAGES

The pertinent statutes, Federal Rules of Civil Procedure, and Supreme Court Rules raised by Peavey Electronics Corporation's Brief in Opposition and Motion for Damages are listed below; they are reproduced in their entirety in Appendix B:

Statutes:

1. Sherman Antitrust Act §1, 15 U.S.C. § 1

Federal Rules of Civil Procedure:

1. Fed. R. Civ. P. 41(b)
2. Fed. R. Civ. P. 52(a)

Supreme Court Rules:

1. Sup. Ct. R. 17.1
2. Sup. Ct. R. 49.2

STATEMENT OF THE CASE

A. Procedural Overview

Clair Olsen and Guitar City Studios, Inc. (hereinafter collectively referred to as "Olsen"), petitioners herein, filed this antitrust action in 1975 against Progressive Music Supply, Inc. (hereinafter referred to as "Progressive"), a competing Utah retailer of musical instruments and audio equipment. Also named as defendants were several manufacturers of musical instruments and audio equipment including this respondent, Peavey Electronics Corporation (hereinafter referred to as "Peavey"). Thereafter, four years of extensive discovery ensued, and Olsen presented his case for 27 total trial days in a trial to the court. Olsen closed his case on June 12, 1979. Peavey filed a motion for involuntary dismissal pursuant to Fed. R. Civ. P. 41(b). After extended and careful scrutiny of the evidence and inferences adduced at trial, and additional extensive briefing by the parties, all claims against Peavey were dismissed on May 22, 1980. *See* App. A. The trial court found that Olsen had failed to meet his burden of proof or to establish a case that Peavey violated any of the antitrust laws.[1]

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[1] After the Rule 41(b) dismissal of Peavey, and certain other manufacturers, Olsen's only remaining claim was that Progressive violated §1 of the Sherman Act in its dealings with two nondefendants, CBS Musical Instruments (hereinafter referred to as "CBS Musical") and Mrs. Bobbie Herger (hereinafter referred to as "Herger"), a CBS Musical retail dealer in Provo, Utah. The allegations against CBS Musical and Herger are unrelated to those against Peavey. Trial of these matters resulted in findings that Progressive, along with Herger and CBS Musical, were involved in a boycott to prevent Olsen from receiving instruments from CBS Musical. Actual damages awarded were $4,303.00. The trial court also found that Progressive and Herger conspired to fix the resale prices on CBS Musical products sold to consumers at the retail stores; however, the court found no damages attributable to this conduct. *Olsen v. Progressive Music Supply, Inc.*, 1982-2 Trade Cas. ¶ 64,928 (D. Utah 1981).

The United States Court of Appeals for the Tenth Circuit reviewed the extensive record under the "clearly erroneous" test of Fed. R. Civ. P. 41(b), 52(a). Without significant discussion, the Tenth Circuit concluded that the trial court's rulings on the issues pertinent to Peavey were correct, and affirmed the district court's dismissal of all claims against Peavey. The Court also affirmed in all other respects the rulings of the trial court as to the other defendants. *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432 (10th Cir. 1983).

B. Factual Overview

Olsen prematurely discusses the facts of the case, as he perceives them, rather than the reasons this Court should grant review. Therefore, the following factual overview is offered in rebuttal.

Olsen's initial difficulties arose from facts unrelated to Peavey. Olsen was a full-time employee of the federal government working at Hill Air Force Base until April 1974. On a part-time basis, beginning in 1964, Olsen operated a small, sole proprietorship, selling musical instruments, amplifiers, public address systems, and accessories in Kaysville, Utah. Olsen alleged he had difficulties obtaining instruments from various manufacturers beginning in 1971. Thus, the time frame that is relevant for consideration of Olsen's claims extends from April 1971 to March 1975.

Olsen acquired distributorships for two additional lines of audio equipment, Farfissa and Acoustic, in 1974 after settling disputes with a former business partner; these acquisitions prompted him to relocate in a larger store in Kaysville and to begin selling on a full-time basis. (TT., Vol. V, pp. 1350-51, 1354).[2] By devoting his full attention to the musical instrument business, with double his previous floor space, and by adding a repair service, Olsen's sales rose from approximately 7% of the

[2] The Trial Transcript is cited as "TT". A Supplemental Trial Transcript is cited as "Supp. TT".

volume sold by Progressive to a dramatic 70% of Progressive's volume. *See Olsen v. Progressive,* 703 F.2d at 435. Olsen formed a new corporation, Guitar City Studios, Inc., in February 1975, before filing his original complaint in April 1975.

Progressive Music Supply, Inc., is a Utah corporation engaged in the retail sale of musical instruments, amplifiers, public address systems, accessories, and related items. Progressive is an authorized dealer of numerous lines of products including, since the early 1970's, Peavey products, in Ogden, Provo, and Salt Lake City.

Peavey, a Delaware corporation with its principal place of business in Mississippi, began to manufacture audio equipment, speakers and amplifiers in the early 1970's. As a new entrant in the market for manufacturing audio equipment, Peavey initially was unable to compete with established manufacturers, like CBS Musical and several others, who possessed substantial name recognition and goodwill among purchasers. (TT., Vol. I, pp. 28-9). Peavey also was fettered by its limited manufacturing facilities.

Peavey was practically unknown when it entered the Utah market. To facilitate its market penetration, Peavey established Progressive, then one of the largest dealers in Utah, as its exclusive dealer within a 250-mile radius of Progressive's three store locations. Olsen unjustifiably reads an evil motive into Peavey's business judgment. As the district court found below, Olsen's business was a small, part-time operation. It was without any facilities to provide repair or warranty service at the time Peavey granted an exclusive dealership to Progressive. Significantly, the trial court found that Peavey exercised reasonable business judgment in establishing an exclusive dealership with Progressive to maximize the impact of Peavey's entry into the Utah market in the early 1970's. *See* App. A at 9a-11a.

Peavey's high quality, moderately-priced products gained market acceptance more rapidly than Peavey could expand its

production. (TT. Vol. III, pp. 657-59; Vol. VII, pp. 735-36). Naturally, in such circumstances, Peavey products were attractive to individual dealers because their customers were willing to pay higher prices to obtain Peavey products. (Supp. TT., Vol. I, pp. 59-62). Olsen incorrectly claims Peavey aided Progressive in fixing these higher prices. However, Olsen failed to show at trial that Peavey even was aware of Progressive's pricing policies, *(See* TT., Vol. V., p. 1303), and the trial court found that Progressive priced independently of Peavey, *see* App. A at 8a-9a.

Olsen also claims that Peavey conspired with Progressive and three of the other manufacturer-defendants to boycott Olsen and to monopolize the Utah market. In connection with Olsen's alleged boycott and monopoly claims the lower court could find "no credible evidence that Progressive and Peavey or anyone else conspired to create a monopoly on behalf of Progressive, or entered into any other illegal or anticompetitive agreement to boycott [Olsen] with respect to Peavey products." App. A at 8a-9a. In regard to the alleged conspiracies between Peavey and other manufacturers, the court specifically found absolutely *"no evidence* of agreement or conspiracy between [another manufacturer] and Peavey horizontally at the manufacturer level and Progressive at the retail level to boycott [Olsen] and create a monopoly in favor of Progressive." *Id.* at 11a (emphasis added). Given that Olsen failed to introduce any evidence whatsoever linking Peavey to another manufacturer, the court could make no other findings.

SUMMARY OF ARGUMENT

This case is inappropriate for review on writ of certiorari. No "special and important" reasons for granting review arise in this case, and none are stated in petitioner's brief. There is no conflict between the opinion of the Tenth Circuit in this case and the decisions of other circuits or of this Court. Both the

district court and the Tenth Circuit applied the correct standards of judgment and review and neither court, as Olsen suggests, departed from the accepted and usual course of judicial proceedings in deciding this controversy. Olsen's petition merely challenges the lower courts' finding that his factual evidence was insubstantial.

Peavey's dismissal pursuant to Fed. R. Civ. P. 41(b) created no conflict among the Circuits because Olsen failed to produce any evidence of Peavey's participation in either a group boycott or any conspiracy in restraint of trade. Olsen offered no proof of a relevant market. Olsen's allegations and claims cannot be substituted for the trial court's findings. The Supreme Court does not sit as a trier of fact, as Olsen apparently desires.

The district court correctly weighed the evidence as the trier of fact pursuant to Fed. R. Civ. P. 41(b). The Tenth Circuit then correctly applied the "clearly erroneous" test as required by Fed. R. Civ. P. 52(a) in its review of the trial court's findings.

Olsen's petition is frivolous as it seeks merely a *de novo* review of the inferences and conclusions of the trial judge. Olsen's contrived effort to create an inter-circuit conflict through the misstatement of the facts and the governing law entitles Peavey to recover the costs it unjustly incurred in responding to Olsen's petition.

ARGUMENT

I. OLSEN FAILS TO SATISFY THE STANDARDS GOVERNING REVIEW ON CERTIORARI CONTAINED IN RULE 17 OF THE SUPREME COURT RULES.

This is not an appropriate case for review by this Court. Review on writ of certiorari is a matter of this Court's discretion, "and will be granted only when there are special and important reasons therefor," Sup. Ct. R. 17.1. Olsen's petition is frivolous because the issues it raises with respect to Peavey do not even arguably meet the standards set forth in Supreme Court Rule 17.

Rule 17.1(a) indicates that certiorari may be granted "[w]hen a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals . . . ." The trial judge's refusal to find the facts as Olsen would have found them does not mean that the opinion in this case is in conflict with decisions of other circuits. Although Olsen alleges the "proof" of certain facts, his argument merely goes to the weight of the evidence.

Olsen makes three claims against Peavey: (1) Olsen alleges he "proved" a group boycott under *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), Brief for Petitioner at 8, based upon the "clear weight of the evidence," Brief for Petitioner at 10; (2) Olsen alleges he "proved that the refusals to deal [with Olsen] by Peavey [in order] to grant Progressive an exclusive dealing [sic], had an anticompetitive effect in the market . . .," *id.* at 8; and (3) Olsen alleges that "the court's dismissal of . . . Peavey dismembered the conspiracy contrary to . . . *Continental Ore* [*Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)]" *id.* at 8. As will be shown below, the sufficiency of Olsen's "proof" does not raise a conflict among the circuits.

Rule 17.1(a) also indicates review may be granted where a federal court of appeals "has so far departed from the accepted

and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." The district court did not depart from accepted judicial proceedings by granting Peavey's motion for involuntary dismissal pursuant to Fed. R. Civ. P. 41(b). The Tenth Circuit did not sanction any such departure by application of the "clearly erroneous" test of Fed. R. Civ. P. 52(a). This Court should not allow Olsen to raise again the issue of "special inferences" in his petition for certiorari, after being admonished by the Tenth Circuit that his view was "unfounded". *Olsen v. Progressive,* 703 F.2d at 436. Olsen's citation of *Continental Ore,* a case involving a directed verdict, as support for his "special inferences" argument, is misplaced. A different standard applies when, as in this case, the cause was tried to the court rather than to a jury.

In sum, Olsen was given a full and fair opportunity to present all his evidence against Peavey. The trial court's finding that his evidence was insubstantial does not constitute a departure from normal judicial procedure.

Finally, the order dismissing Peavey because of Olsen's insufficient evidence did not decide "an important [unsettled] question of federal law," or create a "conflict with applicable decisions of this Court," Sup. Ct. R. 17.1(c). Olsen has failed to show why this case should be heard by the Supreme Court.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS: OLSEN HAS ATTEMPTED TO MANUFACTURE A CONFLICT AMONG THE CIRCUITS BY MISREADING APPLICABLE PRECEDENT AND IGNORING THE FINDINGS OF THE TRIAL COURT.

A. There is no conflict with *Klor's:* Olsen failed to prove a group boycott.

Olsen confuses the allegations necessary to sustain a cause of action with the facts he must prove to entitle him to relief.

Olsen asserts that he was the victim of a group boycott in which Peavey participated, and that he is entitled to relief under *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Brief for Petitioner at 8. This Court should reject Olsen's erroneous reading of the holding of *Klor's*, as well as Olsen's conclusory and incorrect statement of the facts "proven" at the trial court.

The specific issue decided by *Klor's* was whether a complaint alleging a conspiracy among manufacturers, distributors, and a retailer to boycott Klor's stated a cause of action under section 1 of the Sherman Act, 15 U.S.C. § The Ninth Circuit had affirmed the trial court's grant of summary judgment against Klor's, holding that the required showing of a public injury was missing: "[A] violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 255 F.2d 214, 233 (9th Cir. 1958). The Supreme Court's reversal of the Ninth Circuit was a matter of statutory interpretation, the Court determining that "Klor's *allegations* clearly show one type of trade restraint and public harm the Sherman Act forbids," *Klor's*, 359 U.S. at 210 (emphasis added). Thus, Klor's "remedy" was the opportunity to go to trial to sustain its allegations.

Olsen already has been given the opportunity to prove his allegations of a group boycott at trial; however, Olsen utterly failed to substantiate those allegations. The district court was unable even to infer such a cause of action against Peavey from the facts introduced at trial. *See* App. A at 6a, 11a. There is no evidence that Peavey contemplated, discussed or took part in any communications with other audio equipment manufacturers, much less to conspire against Olsen. Moreover, Olsen failed to show an agreement of any kind to boycott him between Peavey and any other manufacturers, or any intent to do so. On review, the Tenth Circuit found that "[t]he district court drew permissible inferences based upon the record evi-

dence," *Olsen v. Progressive,* 703 F.2d at 436. The fact that both the district court and the Tenth Circuit found Olsen's evidence to be so insubstantial that judgment for Peavey under Fed. R. Civ. P. 41(b) was appropriate does not mean that Olsen was denied his cause of action under *Klor's. Klor's* was applied consistently by both courts below.

B. There is no conflict with *Com-Tel:* the findings of the district court make *Com-Tel* irrelevant.

In the midst of his group boycott argument, Olsen interjects the claim that he "proved" Peavey's exclusive dealing agreement with Progressive "was an exception to Peavey's normal distribution system," Brief for Petitioner at 10, entitling Olsen to relief under *Com-Tel, Inc. v. DuKane Corp.,* 669 F.2d 404 (6th Cir. 1982). Once again, Olsen misreads his own cited precedent and attempts to show a conflict among the circuits by misstating the facts found by the district court.

Olsen states that:

> [Com-Tel], based on *GTE Sylvania* [*Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977)]; held that an exception to the normal distribution policy combined with an anti-competitive effect created a per se violation of the antitrust laws.

Brief for Petitioner at 10. *Com-Tel* was not "based on" *GTE Sylvania,* but distinguished itself from that case. In *GTE Sylvania,* the Supreme Court held that a vertical restraint on trade, specifically, a location restriction on sales by Sylvania franchisees, should be judged under a rule of reason standard. *GTE Sylvania,* 433 U.S. at 58-9. In *Com-Tel,* the Sixth Circuit ruled that the fact that the defendant singled-out Com-Tel as an unworthy customer, and on an ad hoc basis ignored its own marketing strategy, justified application of a per se standard, in spite of *GTE Sylvania,* because the anti-competitive effect was equivalent to the effect of a group boycott, *Com-Tel,* 669 F.2d

at 411-12. In essence, *Com-Tel* created a narrow exception to *GTE Sylvania* for vertical restraints that are targeted at individual dealers and have the effect of a group boycott.

The *Com-Tel* exception does not apply to Peavey. The Sixth Circuit distinguished *GTE Sylvania* in *Com-Tel* because, "[t]he efficiencies perceived by the *Sylvania* Court as promoting interbrand competition by bolstering Sylvania's entire distribution network could not be achieved by DuKane by singling out Com-Tel for exclusionary treatment," *Com-Tel,* 669 F.2d at 412. The market conditions described by Justice Powell in *GTE Sylvania* that gave rise to those efficiencies were identical to the conditions faced by Peavey when it granted an exclusive dealership to Progressive. Justice Powell correctly observed that:

> [N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products . . . . The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product.

GTE Sylvania, 433 U.S. at 55.

The district court properly placed the burden on Olsen to demonstrate that the exclusive dealership agreement with Progressive constituted an unreasonable restraint on trade, after noting the acknowledged fact that Peavey, a new entrant into the audio equipment business, agreed to and did utilize Progressive as its exclusive dealer within a 250-mile radius of Progressive's stores. *See* App. A at 6a-7a, 8a-11a. Olsen failed to meet this burden. Moreover, the district court found ample evidence that Peavey's exclusive dealing agreement with Progressive was "pro-competitive," supported by "good and

substantial business justification," "reasonable," "not in restraint of trade," the "result of reasonable business judgment," and "valid and legal." *Id.* at 9a-11a. Clearly, given these findings, Peavey's business decisions fit precisely into the scheme described by Justice Powell in *GTE Sylvania,* and application of the *Com-Tel* exception would be totally unwarranted.

C. There is no conflict with *GTE Sylvania:* Olsen failed to prove any anticompetitive effect resulting from Peavey's agreement with Progressive.

Olsen's claim that "the Circuit Court's decision is in conflict with this Court in *GTE Sylvania,*" Brief for Petitioner at 11, is not well founded. In *GTE Sylvania,* the Supreme Court overruled *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), reimposing the "rule of reason" analysis for the examination of vertical restraints. *See GTE Sylvania,* 433 U.S. at 58-9. Significantly, Olsen does not argue that the rule of *GTE Sylvania* was improperly applied as to Peavey; Olsen instead disputes the facts found by the trial court, claiming to have proven both anticompetitive higher prices and a relevant market in which to evaluate their effect. Before discussing Olsen's assertions, it is important to note that Olsen does not actually allege any conflict among the circuits. Once again, Olsen's refrain of "conflict!" is nothing more than a cry that his alleged "facts" and "proof" should not have been held insubstantial and unsupported.

With regard to the alleged resale price fixing claims, the court specifically found that Peavey, *"according to plaintiff Olsen's testimony,* was unaware of Progressive's pricing and was not involved in any of Progressive's pricing decisions," App. A at 7a-8a (emphasis added). The evidence presented by Olsen provided the "reasonable inference" for the trial court "that there was no [price fixing] conspiracy or agreement" between Peavey and Progressive, *id.* at 7a-9a, with the strong implication, based on Olsen's own testimony, that "Progressive priced *independently* of Peavey." *Id.* at 8a-9a (emphasis in original).

With regard to Olsen's relevant market, Olsen introduced no credible proof of the relevant product market in his effort to show restraint of trade. Olsen offered no evidence of the market shares or market power held by any defendant manufacturer or Progressive in *any* markets, including the alleged "quality" audio market. Naturally, this absence of evidence made it impossible for the district court to determine if trade or commerce had been restrained at all, much less unreasonably restrained. In these circumstances, Peavey properly was entitled to judgment as a matter of law. *See Determined Productions, Inc. v. R. Dakin & Co.*, 514 F. Supp. 645 (N.D. Cal. 1979), *aff'd*, 649 F.2d 866 (9th Cir. 1981).

Olsen now, for the first time, attempts a new market definition. He argues:

> As to proving the effect in a relevant market, the petitioner established the relevant market was professional instrument [sic] as opposed to amateur instrument [sic]. *See, Eastman Kodak Co. v. Southern Photo Material Co.*, at 273 U.S. 376 (1927). [sic].

Brief for Petitioner at 11. Olsen then contends that the lower courts rejected his asserted "relevant market," creating a conflict with *Eastman Kodak*. Again, there is no conflict. Yet another time, Olsen confuses his own allegations with the findings of the trial court. Most significantly, Olsen did not even allege the professional versus amateur distinction below, where he argued that "quality" audio equipment was the relevant market. *See Olsen v. Progressive*, 703 F.2d at 436. Regardless of the label Olsen seeks to attach, his market definition is vague and unproven.

D. There is no conflict with *Continental Ore:* the dismissal of Peavey because Olsen could not prove a conspiracy does not constitute the dismembering of an alleged conspiracy.

Olsen again seeks to substitute his naked allegations for the findings of the trial court by claiming he proved the existence of

a conspiracy. Olsen is correct in noting that only a small amount of evidence is necessary to join a defendant to a proven conspiracy. However, the cases Olsen cites, which are discussed below, make clear that it is the responsibility of the trier of fact — here the trial judge, and not Olsen — to determine if that small amount of evidence has been shown.

In *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078 (5th Cir. 1978), *cert. denied,* 437 U.S. 903 (1978), the question was whether Cadillac had participated in a proven conspiracy. There, the Fifth Circuit deferred to the findings of the trial court: "The trial judge heard the evidence, assessed the credibility of all the witnesses, and found that Cadillac was a participant. . .," *id.* at 1087. *Morton Salt Co. v. United States,* 235 F.2d 573, 579 (10th Cir. 1956) is in accord. The trial court *instanter,* with proper review by the Tenth Circuit, weighed the same factors and found that Peavey did not participate in a conspiracy. The trial judge stated, with regard to Peavey, that the "court has weighed all of the evidence and the reasonable inferences to be drawn therefrom and has concluded that the plaintiff has not met its burden or made out a case, based on persuasive evidence in the record, from which an inference can be drawn that. . . Peavey conspired with any other defendant or unnamed co-conspirator . . . ," App. A at 6a. On review, the Tenth Circuit ruled that "[t]he district court drew permissable inferences based upon the record evidence," *Olsen v. Progressive,* 703 F.2d at 436. Unquestionably, Olsen failed to prove a conspiracy.

Olsen equates the dismissal of an unproven, alleged co-conspirator with the dismemberment of a proven conspiracy. In doing so, Olsen misconstrues what the Supreme Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962), described as "dismembering the conspiracy" and wrongly applies it to the facts of this case. The *Continental Ore* court rejected the lower courts' compartmentalized consideration of the facts alleged to constitute a conspiracy. *See id.* at

698 (lower court "examined *seriatim* the [5 alleged instances of interference] and ruled separately upon the . . . damage to Continental in connection with each of these episodes"). In this case, the lower courts considered Olsen's evidence in its entirety, and gave him "the full benefit of [his] proof," *id.* at 698-99. Olsen simply failed to meet his burden as to Peavey in the eyes of the trial judge.

III. THE LOWER COURTS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

A. The district court applied the proper standard of judgment for an involuntary dismissal at the close of Olsen's evidence in a case tried to the court.

The trial court weighed the evidence and inferences therefrom, without making any special inferences in Olsen's favor, and determined that Olsen had failed to establish a case against Peavey. This is the proper role for the district court under Peavey's motion.

Olsen cites *Continental Ore* for the proposition that a court "must consider the evidence in its strongest light in favor of the party against whom the Motion for a directed verdict is made and must give him the advantage of every fair and reasonable intendment that the evidence can justify," Brief for Petitioner at 12 (quoting *Continental Ore,* 370 U.S. at 696). However, Olsen is confused again: Olsen's case was tried to the court, not to a jury, and a motion for judgment at the close of plaintiff's case requires the application of a standard entirely different from a directed verdict.

> In [granting defendant's motion for judgment at the close of plaintiff's case], the court is not as limited in its evaluation of plaintiff's case as it would be on a motion for directed verdict. The court is not to make any special inferences in the plaintiff's favor . . . . Instead, it is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies.

9 Wright & Miller, Federal Practice and Procedure § 2371 (1977). *See, e.g., Emerson Electric Co. v. Farmer,* 427 F.2d 1082, 1086 (5th Cir. 1970) (distinguishing directed verdict); *Woods v. North American Rockwell Corp.,* 480 F.2d 644, 645-46 (10th Cir. 1973) (no special inferences); *Rutledge v. Electric Hose & Rubber Co.,* 511 F.2d 668, 676 (9th Cir. 1975) (must weigh the evidence).

The Tenth Circuit rightly characterized as "unfounded" Olsen's contention that, on Peavey's motion for dismissal pursuant to Fed. R. Civ. P. 41(b) in a case tried to the court, he is entitled to have the evidence viewed in a light most favorable to him. *See Olsen v. Progressive,* 703 F.2d at 436. *Continental Ore,* a case tried to a jury, is utterly inapplicable in this context.

B. The Tenth Circuit correctly found that the district court's dismissal of Peavey was not "clearly erroneous."

The standard of review on appeal of an involuntary dismissal under Fed. R. Civ. P. 41(b) is stated in Fed. R. Civ. P. 52(a):

> In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The Tenth Circuit applied the "clearly erroneous" test and affirmed the dismissal of all allegations against Peavey. The court correctly observed that, "[a] choice between two permissible views [of the record evidence] is not 'clearly erroneous,'" *Olsen v. Progressive,* 703 F.2d at 436 (quoting *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.,* 571 F.2d 1144, 1148 (10th Cir. 1978), *cert. denied,* 439 U.S. 862 (1978). *Cf. Commissioner v. Duberstein,* 363 U.S. 278, 291 (1960) ("clearly erroneous" means that reviewing court on reviewing

the whole evidence is left with a definite and firm conviction that a mistake has been made). Indeed, the district court made several inferences in Olsen's favor even though it was not bound to do so. *See* App. A at 6a. Despite its unnecessary reach beyond the Federal Rules of Civil Procedure to make inferences in favor of Olsen and give him every opportunity to show he was entitled to relief, the district court still could not substantiate any of the claims against Peavey. The Tenth Circuit properly affirmed the inferences, conclusions and finding of the trial judge as not "clearly erroneous." There is no error, therefore, and no conflict with the other circuits.

PEAVEY'S MOTION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 49.2

IV. OLSEN'S PETITION IS FRIVOLOUS AND PEAVEY IS ENTITLED TO DAMAGES PURSUANT TO SUPREME COURT RULE 49.2.

Rule 49.2 of the 1980 revisions to The Supreme Court Rules provides in pertinent part:

> When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

This rule should be invoked where a petitioner carelessly misstates applicable precedent and dogmatically asserts that his unsubstantiated allegations constitute "proven" facts in an effort to contrive issues appropriate for review by this Court.

Attorneys have been on notice since the 1980 revisions to the Supreme Court Rules that frivolous petitions might result in an award of damages to the opposing party. *See* E. Gressman & R. Stern, ***Supreme Court Rules: The 1980 Revisions*** 30 (1980) ("Rule 49.2 rewrites and simplifies a little-used but appropriate warning to counsel . . ."). Recently, this Court invoked Rule 49.2 for the first time, ***Tatum v. Regents of Nebraska - Lincoln,***

51 U.S.L.W. 3879, 3883 (June 13, 1983) (No. 82-6145), and threatened Rule 49.2 damages in three other cases. *See Garcia v. United States,* 51 U.S.L.W. 3879, 3883 (June 13, 1983) (No. 82-5934); *Escofil v. Pennsylvania,* 51 U.S.L.W. 3879, 3883 (June 13, 1983) (No. 82-6193); *In re Rush,* 51 U.S.L.W. 3879, 3883 (June 13, 1983) (No. 82-6502).

This case provides the Court with the opportunity to develop a fair standard for the evaluation of "frivolous" petitions for certiorari under Rule 49.2. After four years of discovery, Olsen was allowed to present his evidence against Peavey at a trial consisting of 27 trial days—it was found to be incomplete, insubstantial and unconvincing as a matter of fact. Olsen now seeks the reinstatement of these claims. Olsen's continuing refusal to accept the fact of the insufficiency of his evidence is absolutely unsupportable, and has required Peavey to incur unjustified costs approximating $1,500 and attorneys fees that will approximate $4,000. As is evident, Olsen has continually misstated both the facts and the law in an effort to prolong the disposition of this case. The appellate process should not be abused by clogging the courts with burdensome and unnecessary appeals. *Cf. N.L.R.B. v. Catalina Yachts,* 679 F.2d 180 (9th Cir. 1982) (frivolous appeal is one where result is obvious and arguments are without merit).

Several Justices of this Court have stated, with some urgency, that this Court is overloaded with frivolous and unsubstantiated petitions for certiorari. Recently, Chief Justice Burger observed that:

> [a]t least 3000 of the more than 4500 new filings each year fall into [the "utterly frivolous"] category. Increasingly, lawyers have drifted away from the old standard that when they put their name on any paper filed with the Court, they vouch that, in the lawyer's best professional judgment, the question warrants review by the Supreme Court.

Chief Justice Burger's Challenge to Congress, U.S. News & World Rep. 38 (Feb. 14, 1983). The Chief Justice has also stated, "[A] lawyer has not only the right, but a duty, to decline to press a frivolous case and impose burdens on the courts, while legitimate claims wait to be determined." *Unclogging The Courts - Chief Justice Speaks Out, Interview with Warren E. Burger,* U.S. News & World Rep. 36 (Feb. 22, 1982).

Supreme Court Rule 49.2 is a prudent measure by which to curb the increasing flow of insubstantial appeals to this Court through attorney self-regulation. To accomplish this necessary end, this Court should apply Rule 49.2 to Olsen's petition, and others like it, which couch what is merely a request for a *de novo* review of the trial judge's factual findings by concocting frivolous legal issues it claims are appropriate for Supreme Court review.

CONCLUSION

For the foregoing reasons, Peavey Electronics Corporation respectfully requests that this Court deny Petitioners' request for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. Peavey Electronics Corporation also prays that this Court award it damages pursuant to Supreme Court Rule 49.2.

Dated this 15th day of July, 1983.

Respectfully submitted,

GARDERE & WYNNE
Original Signed by
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., *Plaintiffs,* v. PROGRESSIVE MUSIC SUPPLY, INC., et al., *Defendants.*	ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS UNDER RULE 41(b) C 75-0153

I. FACTUAL BACKGROUND

In 1964 plaintiff Clair Olsen, along with George Best and Earl Reed, organized a corporation under the laws of the State of Utah entitled "Guitars, Inc." Mr. Reed died in approximately 1967 and his interest was purchased by Steven Hight. Guitars, Inc. opened a store in Bountiful, Utah, which operated under the trade name of Guitar City Studios. In 1966, another store was opened in Kaysville, Utah, which later became connected with Guitars, Inc., and also operated under the trade name of Guitar City Studios. These stores were engaged in the business of selling musical instruments and equipment for sound reproduction. Plaintiff Olsen operated the Kaysville store and George Best operated the Bountiful store.

Until 1970 the corporation functioned basically as a purchasing entity for the two stores. Each individual, Olsen and Best, would place his orders through the corporation and each

individual was to be responsible to pay for his orders. The corporation, besides ordering instruments for the stores, paid half of the telephone bills of each store and held the franchises in its name. The ordering function, the holding of the franchises, and the paying of the telephone bills were essentially the only functions of the corporation. The stores placed proceeds from the sales of instruments into the corporation from which the bills were paid and the purchases of instruments made. All other bills of each store were handled separately by each store. Funds left in the corporation after payment for the instruments and telephone bills were divided so that the person making a sale received a commission therefor and any profits left over after payment of commissions were to be divided in thirds among Best, Olsen, and Hight.

During 1970, disagreements arose between plaintiff Olsen and George Best, and several discussions took place concerning dissolution of the corporation. In July, 1970, it was decided to keep the corporation alive to continue serving as a purchasing entity for the two stores. In October, 1970, however, a separation agreement was executed by Olsen and Best which essentially terminated all other relations between them. Each began conducting distinct business operations, essentially as sole proprietors of each store, although the corporation still served as a purchasing entity. In January of 1971, Olsen attempted to sell his store in Kaysville without consulting with or obtaining permission from Best. In May of 1971, Best entered into a brokerage agreement with the defendant Progressive Music Supply, Inc. (Progressive), one of the largest retail music instrument dealers in Utah. During this period of time, Best was still functioning as president of Guitars, Inc. This situation led to many internal conflicts in Guitars, Inc., and several attempts were made by the parties to dissolve the corporation or require Best to retire.

Olsen claims that in 1972 he brought suit against Best, and the litigation resulted in a settlement wherein all the interest in Guitars, Inc. was assigned to Olsen. In February of 1975 he

formed a new corporation known as Guitar City Studios, Inc., a plaintiff herein. During this time period several changes were made in his business. For example, during the period prior to 1974, Olsen operated his Kaysville store on a part-time basis only. In 1974 he moved his location and commenced business on a full-time basis and has so continued through the relevant period. In addition, he added a repair service to his business, which significantly increased his sales potential.

Following these changes in business operation, plaintiffs' sales increased dramatically. Prior to 1974, plaintiffs sold approximately 7% of the volume that was sold by defendant Progressive during that period of time. After going full time in 1974, plaintiffs' sales rose rapidly until in 1977 they were approximately 70% of defendant Progressive's sales. This was a remarkable accomplishment in view of plaintiffs' assertions that Progressive was the market leader in Utah and held exclusive franchises or dealerships for several products claimed to be essential to the inventory of a competitive music store. Thus, in the short space of three years, and without the claimed leading lines, plaintiffs' business grew from a small and insignificant part of the market to a size of substantial comparability to the largest dealer in Utah.

After Best had entered into the brokerage agreement with Progressive in 1971, Olsen experienced alleged difficulties in obtaining musical instruments from various manufacturers, which ultimately became the basis of this action. All of the defendant manufacturers named in the present litigation allegedly were willing to make Olsen a dealer, but later refused to sell to Olsen due to commitments to Progressive. Olsen was thus forced to obtain their instruments through other dealers at higher cost, allegedly causing financial loss. As a result, in April of 1975 Olsen and his new corporation, Guitar City Studios, Inc., brought suit against Progressive and six manufacturers.

A non-jury trial was held and presently all of the manufacturers, except Acoustic Control Corporation (Acoustic) and Peavey Electronics Corporation (Peavey), have been dismissed

from the action, either by stipulation of the parties or by order of the court. These two, with Progressive, remain in the case. The claims involve various alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2 (Supp. 1980).

At the trial, after the conclusion of plaintiffs' case, oral arguments were scheduled on a motion to dismiss filed by the remaining defendants under Rule 41(b) of the Federal Rules of Civil Procedure. Argument was heard on July 31, 1979. At the hearing defense counsel indicated that he was reserving the right to put on some evidence and therefore intended only to argue the motion to dismiss and not finally submit the case. Because of urgent time constraints of the parties, and at their request, the court accordingly heard argument on the Rule 41(b) motion and allowed them to file supplementary briefs. The final memorandum was submitted in December, 1979. The court has reviewed the voluminous briefs, the arguments of counsel and the record, and deems itself advised and prepared to make a ruling.

II. PLAINTIFFS' CLAIMS

The plaintiffs allege violations of sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1, 2 (Supp. 1980), by Progressive, Acoustic, and Peavey. Specifically, plaintiffs allege that Progressive conspired separately and jointly with each manufacturer to fix prices, establish Progressive as each manufacturer's exclusive dealer in the state of Utah (or in the case of Peavey a 250-mile radius), terminate plaintiffs' dealing in each manufacturer's products (except as against Peavey), and boycott the plaintiffs' business. Plaintiffs further complain that Progressive conspired with certain unnamed co-conspirators, i.e., George Best, CBS Musical Instruments (CBS), and Bobbie Herger in violation of section 1 of the Act. Plaintiffs assert that Progressive conspired with Best to cause plaintiff to lose franchises, to destroy plaintiffs' credit and business reputation, to take over plaintiffs' business location and terminate plaintiffs' corporate charter, to fix prices, and to cause manufacturers to boycott plaintiffs' business. Plaintiffs further allege that Pro-

gressive and CBS, with the help of Herger, conspired to establish Progressive as CBS's exclusive dealer for the state of Utah, to fix prices, to terminate plaintiff as a CBS dealer, to boycott plaintiffs' business and to cause CBS to require other dealers not to sell CBS products to plaintiffs. Finally, plaintiffs allege that the defendants conspired together to boycott plaintiffs and to attempt to monopolize the Utah market in certain musical instruments. (Pre-trial Order, filed April 5, 1979).

As to section 2 of the Act, plaintiffs complain that Progressive attempted to monopolize the Utah retail market in quality synthesizers, quality amplifiers, and quality electronic and acoustic guitars. "Quality" was defined as guitars and amplifiers retailing for over $300 and synthesizers retailing for over $700. (Plaintiffs' Memorandum in Opposition to Defendant Progressive's Motion for Summary Judgment, Exhibit 17(g) ¶3; Supplementary Transcript, Vol. VII, p. 182). The defendants specifically deny any acts in violation of sections 1 and 2 of the Sherman Act, and deny any monopoly or attempt to monopolize, or any price-fixing, boycotting or other restraint.

A. SECTION 1 VIOLATIONS

Section 1 of the Sherman Act provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

15 U.S.C.A. § 1 (Supp. 1980). To establish a violation of § 1 of the Sherman Act, plaintiffs must show three elements: 1) a contract, combination or conspiracy; 2) affecting interstate commerce; and 3) an unreasonable restraint of trade. *See, e.g., Mowery v. Standard Oil Co. of Ohio,* 463 F. Supp. 762, 765 (N.D. Ohio 1976), *aff'd,* 590 F.2d 335 (6th Cir. 1978). Plaintiffs acknowledge that some sort of concerted action must exist in order for a claim to come within this section. However, they cite several cases in their brief filed on November 8, 1979, to the effect that an express or formal agreement need not be

proved, and that rational and reasonable inferences may be drawn to support a finding of an agreement or a conspiracy from evidence giving rise to such inferences, and that such a finding may be based solely upon such inferences. *See, e.g., Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 221-23 (1939); *Westman Comm'n Co. v. Hobart Corp.,* 461 F. Supp. 627, 629, 631-32, 635-36 (D. Colo. 1978). The court accepts the support the rulings in these cases provide in considering reasonable inferences to help resolve the issues in this case.

The court has weighed all of the evidence and the reasonable inferences that may be drawn therefrom and has concluded that the plaintiff has not met its burden or made out a case, based on persuasive evidence in the record, from which an inference can be drawn that either Acoustic or Peavey conspired with any other defendant or unnamed co-conspirator in violation of section 1. The court also finds that plaintiffs were never dealers during the relevant period for manufacturers Acoustic or CBS. Thus, plaintiffs' claims in the pre-trial order that some of the defendants agreed with other entities to terminate plaintiffs' Acoustic and/or CBS dealership must fail. The court does find, however, that there is evidence in the record from which reasonable inferences might be drawn to support a conclusion that Progressive conspired with CBS and/or Mrs. Bobbie Herger of Herger's Music in Provo, Utah, to fix prices on CBS products and to divide the market and boycott plaintiffs from obtaining CBS products from CBS's dealers, and that such an agreement affected interstate commerce and was in restraint of trade, as discussed hereinafter. There also remains the question whether or not such a violation, if found, caused recoverable damage to these plaintiffs during the relevant period.

1. Alleged Agreement or Conspiracy Between Acoustic or Peavey and Progressive

Any agreement between Acoustic or Peavey, both of whom are manufacturers of musical instruments and equipment, and Progressive, a retailer, would properly be characterized as a

vertical agreement. The Supreme Court recently expressed its view that vertical agreements may give rise to violations, but should be governed under the rule of reason as explained in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977). The Court acknowledged, however, that vertical agreements or restrictions, "in varying forms, are widely used in our free market economy," and "there is substantial scholarly and judicial authority supporting their economic utility." 433 U.S. at 57-58. Consequently, though characterized as a vertical agreement, plaintiffs still must show the anticompetitive effects of any such agreement in addition to showing that such an agreement existed in accordance with the elements of a section 1 violation as mentioned above, 433 U.S. at 58-59, unless the subject matter of such agreement falls within a *per se* violation category such as resale price maintenance. 433 U.S. at 51 n. 18.

Plaintiffs claim that Peavey conspired with Progressive to establish Progressive as an exclusive dealer within a 250 mile radius, to boycott the plaintiffs, and to fix prices. They assert that Acoustic conspired with Progressive to establish Progressive as an exclusive dealer in Utah, to terminate plaintiffs as an Acoustic dealer and boycott them, and to cause Acoustic to contact plaintiffs' customers and discourage them from dealing with plaintiffs. It is also argued that Progressive, Acoustic and Peavey conspired with other manufacturers to boycott the plaintiffs and to attempt to create a monopoly on behalf of Progressive. Pre-trial Order, filed April 5, 1979.

As to Peavey specifically, the defendants claim the evidence indicates Progressive set its own prices independently of Peavey, and above Peavey's recommended price list. Peavey, according to plaintiff Olsen's testimony, was unaware of Progressive's pricing and was not involved in any of Progressive's pricing decisions. Olsen testified that he spoke with Hartley Peavey of Peavey at a trade show in 1972 about his knowledge of Progressive's pricing practices. Mr. Peavey indicated that he was unaware of what Progressive was doing about pricing in

Utah. (Transcript Vol. V, p. 1303). The only other evidence even remotely relating to a Progressive-Peavey price-fixing conspiracy is certain testimony of Michael Draper. Draper, a one-time employee of Progressive, testified concerning a conversation he had with Don Penman of Progressive in which Penman related a discussion he had with Hartley Peavey regarding prices. It was to the effect that Penman told Peavey not to publish list prices in a trade magazine on his products in Progressive's area. On one occasion, Hartley Peavey apparently forgot about Penman's request and did publicize prices. When asked not to do so again by Penman, Peavey discontinued the practice. It is to be remembered there were no other dealers involved in this transaction. The reason cited in the testimony for Penman's request that Peavey not publicize list prices was that due to costs of shipping the products to Utah, and costs involved in building up inventories, Penman needed to charge higher prices, and that the market could command higher prices in Utah. (Supplemental Transcript Vol. I pp. 59-62).

The reasonable inference from the evidence presented on the alleged price-fixing conspiracy between Progressive and Peavey is that there was no such conspiracy or agreement, since Peavey did not know of Progressive's selling prices and those prices were above the published list. This evidence strongly implies that Progressive priced *independently* of Peavey. Certainly, had the price been set *below* the list price in an apparent attempt to undercut competition, a different inference might arise. Or, if Peavey received kickbacks out of an increased profit margin of Progressive, made possible by its exclusive dealership and higher prices received for the products above list prices, a different inference might arise. The fact that Progressive's prices were *above* Peavey's list prices, and the absence of any evidence of any kickbacks or benefits to Peavey, indicate that Peavey did not benefit in any way from the higher prices and strongly imply an absence of any intent on Peavey's part to set those prices. The fact that Peavey forgot about Penman's

request not to publish list prices strongly suggests little or no cognizance on the part of Peavey at that time concerning Penman's request. Peavey was apparently not thinking about what Penman was doing in Utah with regard to price. The court finds that there was no price-fixing agreement between Progressive and Peavey which has been established by the evidence.

There is also no credible evidence that Progressive and Peavey or anyone else conspired to create a monopoly on behalf of Progressive, or entered into any other illegal or anticompetitive agreement to boycott plaintiffs with respect to Peavey products. The court notes that there was evidence presented to the effect that Progressive was installed as Peavey's exclusive dealer in Utah. However, exclusive dealing agreements are viewed under the rule of reason as noted above, in light of their economic utility and competitive impact.

There was testimony to the effect that Peavey offered a popular product, but had limited manufacturing capabilities. As a result, retail dealers had a heavy demand for the product but limited supply. Thus, dealers could readily sell Peavey products on the retail market for full price and would have little incentive to sell the products to a competing dealer at a discount. Further, the limited supply and delivery delays meant that it was difficult to keep Peavey products in stock. Under these conditions, dealers would have little reason to sell the product to a competitor. (Transcript, Vol. III, pp. 657-59; Vol. VII, pp. 1735-36). Thus, the fact that Olsen could not purchase Peavey products from other dealers is credibly and amply explained by pro-competitive factors.

Furthermore, there is good and substantial business justification in the record to support the conclusion that Progressive's exclusive dealership in Peavey products during the relevant period of time was reasonable and pro-competitive and not in restraint of trade. Between 1971 and 1973 Peavey was far from the top of the product lines. Testimony of Michael Draper

indicated that Peavey could not compete with other manufacturers until approximately 1974 or 1975. (Transcript, Vol. I, pp. 28-29). The record also indicates that during the time in which Peavey was entering the market, Progressive was one of the largest dealers in Utah, and Olsen's store was still quite small and only operated on a part-time basis. Under these circumstances, the court finds that Peavey's relationship with Progressive was a result of reasonable business judgment, and viewed under the rule of reason was valid and legal.

The record also lacks credible evidence with which to support an inference of price-fixing, boycotting or other anti-competitive agreements between Acoustic and Progressive during the relevant period. There was evidence that Progressive sometimes followed Acoustic's recommended price, but at other times sold at higher prices. There is no evidence indicating that Acoustic was in any way involved in Progressive's pricing decision. With regard to alleged boycotting of plaintiffs, Olsen testified that he believed Acoustic had accepted him as a dealer at a trade show in 1974 and had confirmed the relationship when a representative visited Utah later in the year, and then had terminated Olsen's franchise as a result of an agreement with Progressive to do so. (Transcript, Vol. V, pp. 1339-50, 1355-66). The testimony of Acoustic's representative, Aspen Pittman, was to the contrary. According to Pittman, he and Olsen discussed the *possibility* of Olsen's becoming a dealer, pending Pittman's investigation of the current situation in Utah, including Acoustic's *existing* commitment to Progressive. Pittman further testified that he did not make any further commitment to Olsen when he visited his store in May, 1974. Rather, he inspected the premises and then left to meet with Progressive. After Pittman visited Progressive, Acoustic decided *independently* and without Progressive's involvement not to open Olsen as a dealer, but to maintain the existing Progressive-Acoustic relationship. (Transcript, Vol. II, pp. 365-429).

The court finds Pittman's testimony on this point the more persuasive. At the time of the trade show, Pittman had never been to Utah. It is unlikely that, under those conditions, he would have accepted Olsen as a dealer at that time. Further, in earlier deposition testimony, Olsen indicated that Pittman had told him that he would have to inspect Olsen's facilities before making a decision on whether to open Olsen as a franchise. (Deposition of Clair Olsen, Vol. II, pp. 43-46). Since the court concludes that Acoustic did not accept Olsen as a dealer, there can be no viable claim that Progressive and Acoustic acted together to terminate Olsen's Acoustic dealership.

The court finds that there is no substantial evidence to indicate that Acoustic acted in concert with Progressive in deciding not to open Olsen as a dealer. The simple fact that Acoustic made the decision regarding Olsen after Pittman visited Progressive is not enough to support an inference of conspiracy. It would appear to the court that it would be a logical, good business practice for Pittman to investigate existing commitments prior to making decisions about new dealers.

Thus, any agreements which may have existed between Peavey or Acoustic and Progressive which can be inferred from the evidence were made under conditions providing substantial business justification and were reasonable and procompetitive and therefore not violative of section 1. This conclusion is drawn not only from the circumstances governing Peavey's entry into the market and Acoustic's market stature, but also from plaintiffs' own evidence and market performance which failed to show any anticompetitive effect of any such agreements.

Similarly, the court has found no evidence of agreement or conspiracy between Acoustic and Peavey horizontally at the manufacturer level and Progressive at the retail level to boycott plaintiffs and create a monopoly in favor of Progressive. The court has found no evidence linking any of Peavey's activities to any of Acoustic's, and any agreement either one of them

individually may have had with Progressive has been dealt with in the above analysis. Therefore, the motion to dismiss of Acoustic and Peavey is granted in each instance.

2. Alleged Agreement or Conspiracy Between Progressive and Unnamed Co-Conspirators

The court finds that the evidence presented in plaintiffs' case shows that Progressive prevailed upon Mrs. Bobbie Herger of Herger's Music in Provo, Utah to fix prices on CBS products. As a result of their agreement, Progressive and Herger sold at prices above the CBS list price at levels set by Progressive's own price lists. Certain testimony of Herger seems to implicate Mr. Driver of CBS in the alleged price-fixing scheme. (Transcript, Vol. I, pp. 168-71). CBS was initially named in this suit, but was dismissed by stipluation of the parties on November 20, 1975. Herger has not been named.

The initial agreement between Progressive and Herger was reached in 1967, well before the applicable damage period in this case of April 15, 1971, to April 15, 1975. However, there is evidence that the agreement continued until February, 1973. (Transcript, Vol. I, pp. 178-83; 189-92). Both Progressive and Herger had dealership agreements with CBS and by their agreement with each other further delineated certain territories. The court finds that such an agreement would be an unreasonable restraint of trade. Moreover, the "price-fixing" agreement apparent from the record here is the type of agreement among competitors to fix prices on their individual goods that has consistently been held to be *per se* violative of the antitrust laws. *See, e.g., Broadcast Music, Inc. v. CBS,* 441 U.S. 1, 8-9 (1979).

In support of the claims of price-fixing, boycotting and attempted monopolization, plaintiffs have tried to show that Progressive put pressure on CBS to fix prices and boycott or eliminate other dealers from dealing with CBS products. Most of the evidence corroborating such a claim stems from activities which occurred years before the relevant period. Plaintiffs contend that when pressure from a dealer affects a marketing

decision by a manufacturer to refuse to deal with another dealer, or if there is an element of agreement on price with a dealer, the decision will be scrutinized more closely under the antitrust laws than unilaterally-imposed vertical restrictions. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3rd Cir. 1979).

The court finds that there is some evidence in the record from which an agreement in restraint of trade between CBS and Progressive could be inferred. An affirmative link of such an agreement comes from testimony of Herger as follows:

Q: And during the course of these conversations, at any time did you say: "Yes, I will sell at those prices"?

A: Yes.

Q: And when did that occur?

A: In the latter part of 1967, like September.

Q: And where did that conversation take place?

A: It wasn't really a conversation. It was the culmination of events and conversations.

Q: But did you say that to Mr. Penman?

A: That we would sell?

Q: Yes.

A: Pressure was brought to bear.

Q: What did you say to Mr. Penman?

A: It was more a conversation with Mr. Driver. (The CBS sales representative).

Q: Was Mr. Penman present?

A: I don't remember.

THE COURT: Mr. who?

THE WITNESS: Mr. Driver.

Q: And at that time in 1967, did you adopt a sales price policy that was different than the one you had in the past?

A: Yes.

(Transcript, Vol. I pp. 170-71).

As noted, this conversation took place in 1967, approximately four years before the beginning of the relevant damage period. However, there is evidence in the record which strongly indicates that the agreement was still in effect and honored by the parties well into the damage period. Although Herger had been terminated as a CBS (or Fender) dealer from March to approximately December of 1971, she generally adhered to the same prices during that time on her Fender inventories. (Transcript, Vol. I, pp. 177-79). Herger wrote to the president of CBS asking to be reinstated, and upon being reinstated continued selling at the price levels set in Progressive's price lists. However, Herger ultimately prevailed upon the new CBS representative for the area, Ed Payne, in late 1972 to investigate the situation. Payne looked into the matter by checking with Progressive, indicating that CBS personnel were unaware of any pricing agreement. In February of 1973, CBS informed Herger she could sell at any price she desired. She then lowered her prices and in some instances sold below the CBS list prices. She was not contacted thereafter by Penman regarding prices. (Transcript, Vol. I, pp. 187-93). Thus, until at least February of 1973, the court could find that the price-fixing agreement was definitely in effect between Progressive and Herger.

Further, the evidence may support an inference that CBS and Progressive sought to territorialize and to refuse to deal with plaintiffs. Though CBS apparently had a strong national policy of only dealing through authorized dealers and imposing territorial restrictions on those dealers during the relevant period, there are indications that plaintiffs may have been

specifically targeted for a concerted refusal to deal or boycott instigated by CBS or Progressive through CBS. For example, Mr. Browne, a CBS dealer in California, testified concerning a meeting he had in 1974 with Mr. Bull of CBS as follows:

> Q: Can you describe what was said and by whom on that occasion.
>
> A: Mr. Bull said to me that he thought our problems were all over.
>
> I said, "I wasn't aware of any problem."
>
> At which time he said that he had discussed with me in the past the distribution policies of Fender and that he thought it was clear to me what those policies were and that I had evidentially [sic] not adhered to his wishes as the person who establishes the distribution policies of Fender and that he had found my merchandise out of my territory and that it had been sold by another dealer.
>
> Q: Did he say who that dealer was?
>
> A: Yes. The dealer was Clair Olsen.
>
> THE COURT: Who?
>
> THE WITNESS: Clair Olsen.
>
> Q: Would you continue with what was said and by whom.
>
> A: Mr. Bull told me that he did not have the right to tell me who I could and could not sell to but that it was the desire of CBS to control its distribution through authorized dealers, at which time I said I had no desire to interrupt their distribution policies.
>
> So, he explained to me that based on dealings—
>
> Very briefly let me relate that: He told me that Clair Olsen was trouble. In fact, I believe the quote was "This guy is trouble." . . . .

Q: As a result of your meeting with Mr. Bull in 1974, —let me ask that a different way:

Did that meeting in 1974 have any effect with the subsequent dealings that you had with Clair Olsen?

A: Yes, it did.

Q: Would you please describe what he said that had.

A: Well, as I mentioned, in the discussion he advised me that Clair Olsen was not an authorized dealer and that he was trouble for the authorized dealer or dealers that he had in that territory, and it was against his wishes that I sell them.

The insinuation was made that if I did sell him that, as had occurred in the past, an interruption in my supply of CBS products would occur.

Q: Did you discontinue selling to Clair Olsen for a time?

A: Yes, I did.

(Transcript, Vol. V, pp. 1240-41, 1246). Since Progressive and Herger were the only CBS dealers in Utah and since Progressive apparently exerted influence upon CBS to restrict Herger's business and territory, and control prices, it is reasonable to infer that Progressive may have been in collusion with CBS to boycott plaintiffs. The court finds that the evidence presented may well support an inference that Progressive, CBS and/or Herger engaged in anticompetitive agreements, including the price-fixing and boycotting agreements as described above. The court finds no evidence, however, that Olsen was a CBS authorized dealer during the relevant period and, thus, the alleged agreement between Progressive and CBS to terminate Olsen as a CBS dealer cannot be a basis of liability.

Plaintiffs also claim that Progressive conspired with George Best, an unnamed co-conspirator, to take over plaintiffs' business and franchises, ruin plaintiffs' business, fix prices

and boycott plaintiffs. To support these claims, plaintiffs point to the fact that Best entered into a brokerage agreement with Progressive in 1971. Plaintiffs describe Progressive's actions in obtaining Best's services as "pirating" away one of plaintiffs' employees. Plaintiffs also argue that the purchase of the building in which Best had his store from Murray First Thrift and Loan by Progressive's Utah agent indicates an agreement to appropriate plaintiffs' Bountiful store. Finally, plaintiffs rely on the deception caused by Best in running an advertisement in the Salt Lake City telephone directory under Guitar City Studios which stated "See Progressive Music."

Considered separately or together, the three facts referred to above do not establish any of plaintiffs' claims concerning an unlawful Progressive-Best conspiracy. Plaintiffs' characterization of Progressive's signing Best to a brokerage agreement as wrongful is incorrect. The record is clear that Olsen and Best entered into a separation agreement in October of 1970, after which Olsen's store in Kaysville and Best's store in Bountiful essentially operated as separate businesses. Although the corporate charter was still in existence until years later, as early as January, 1971, Olsen tried to sell his store without consulting Best, indicating that both Best and Olsen were free to act independently. The signing of Best was completely consistent with Progressive's policy of maintaining its large network of dealers. In fact, Progressive approached Olsen to inquire whether Olsen desired to become a Progressive broker. There is nothing to indicate that Best's becoming a Progressive broker was not lawful under the antitrust laws. Similarly, the purchase of the Bountiful building from a bank, where Best had his store, can hardly be described as appropriating plaintiffs' store or as wrongful. The court also notes that the purchase occurred after the 1970 separation agreement was executed.

The court is concerned with the deceptive advertisement placed in the Salt Lake telephone directory, most likely by Progressive's agent. This advertisement ran until Olsen and Best settled their differences, including the use of the name,

during litigation between them. Thereafter, Olsen used the name exclusively. Prior to the settlement, each person apparently had as much right to use the name as the other. Consequently, the advertisement was only partly accurate and impacted unfairly on plaintiffs. Although indicating some concerted action by Best and Progressive to diminish the competition resulting from Olsen's store, the advertisement standing alone is insufficient to establish a Progressive-Best conspiracy that violates section 1 of the Sherman Act. The court finds, however, that Progressive's actions with Best may be of assistance in considering the claims of Progressive's predatory intent towards plaintiffs and lend some credibility to the inferences of anticompetitive agreements between Progressive and others (CBS and Herger).

Before proceeding to the Sherman Act section 2 claims, there are two miscellaneous items that merit some attention. First, in Plaintiffs' Brief in Opposition to Defendants' Rule 41(b) motion, at pages 64-67, plaintiffs argue that defendants engaged in certain unfair trade practices which violated the Federal Trade Commission Act, 15 U.S.C. §§41-58. Since this might possibly be construed as a theory of recovery in addition to the Sherman Act claims, the court desires to make clear that it has not considered this claim as an independent basis for relief. Rather, it has been treated as an attempt by plaintiffs to bolster their claim of conspiracy to fix prices. The failure to plead such a theory of recovery, the absence of any such claim in the pre-trial order, the lack of any oral argument on the issue, and the language of plaintiffs' argument on the point (see the last paragraph of page 67 of plaintiffs' brief filed July 25, 1979) convince the court that violations of unfair trade practices were not asserted as a separate ground for relief. Furthermore, the sections cited by plaintiffs do not provide a private cause of action. *Carlson v. Coca Cola Co.*, 483 F.2d 279 (9th Cir. 1973).

Second, plaintiffs have argued in their briefs in opposition to defendants' 41(b) motion that Progressive violated section 1 of the Sherman Act as a result of its consignment/broker

program. It is alleged that Progressive fixed prices with its network of brokers and agreed to divide the market territory among them. This theory of liability first appeared in plaintiffs' filings in opposition to the present motion. It was not contained in the pre-trial order nor were the brokers mentioned as unnamed co-conspirators even though the court recalls asking plaintiffs to name specifically all unnamed co-conspirators at the pre-trial conference. Such circumstances allow the defendants to argue persuasively that the plaintiffs' contention should be rejected as untimely and outside the scope of the trial. The court does not think that it would be incorrect to exclude plaintiffs' latest theory because of lack of timeliness, but it notes that some evidence on the issue was received at trial and that plaintiffs have made some effort to move the court to amend the complaint to conform to the evidence on the price-fixing issue. (Plaintiffs' Brief in Opposition to Defendants' Rule 41(b) Motion, at 41, filed July 25, 1979). Evidence that was received on this issue is insufficient to establish any Sherman Act section 1 violation for which plaintiffs could recover. While liability can exist where a consignment scheme is simply a cloak for the distributor to fix prices with independent dealers, there is no liability if the dealer is an actual agent of the distributor with regard to the distributor's goods. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). The evidence fails to establish that Progressive's brokers were anything other than its agents. (See Transcript Vol. X, pp. 2268-72). Thus, the consignment was not shown to be improper. Also, the evidence is insufficient to support a finding that Olsen was damaged by Progressive's relationship with its brokers. The court concludes, therefore, that no recovery is available under this newly-asserted theory.

In summary of the court's Sherman section 1 rulings, the court dismisses plaintiffs' section 1 claims against Peavey and Acoustic. The court furthermore dismisses any remaining claims against Peavey and Acoustic which may fall within section 2, having found no evidence of any anticompetitive dealing between Peavey and/or Acoustic and Progressive and

there being no basis for attempted monopoly or monopolization claims against either Peavey or Acoustic. Plaintiffs' claims against Progressive under section 1, involving CBS and Herger, remain in the action to await the defense to be proffered by Progressive.

B. PLAINTIFFS' SECTION 11 CLAIMS

1. Monopolization and Attempted Monopolization

Plaintiffs have claimed that Progressive had attempted to monopolize the Utah retail market in certain musical instruments. In order to make out a claim based on an attempt to monopolize, plaintiffs must show a specific intent to monopolize and a dangerous probability of success. *Swift and Co. v. United States,* 196 U.S. 375 (1905). Under the leading Tenth Circuit case in this area, *E.J. Delaney Corp. v. Bonne Bell, Inc.,* 525 F.2d 296 (10th Cir. 1975), *cert. denied,* 425 U.S. 907 (1976), plaintiffs must offer

> proof of market power, or market position (with a definition of the relevant market) . . . in addition to the proof of specific intent. The power must be shown to exist in the relevant market, and this power must create the "dangerous probability" . . . of the power to control prices and to exclude competition.

Id. at 305.

Plaintiffs have failed to offer the proof required by *Bonne Bell.* First, there are significant problems with the evidence relating to the relevant product market. There was very little admissible evidence to show that the product market plaintiffs defined in their complaint is composed of a unique set of products, distinguishable from products selling for less money. In short, the plaintiffs failed to show that the products included in the market definition were not "reasonably interchangeable" and competitive with less expensive products. *United States v. E. I. DuPont de Nemours & Co.,* 351 U.S. 377, 395 (1956). Without evidence of a sufficiently discrete and separable pro-

duct market, the court cannot gauge the defendant's potential for inflicting economic harm. For example, even if plaintiffs had shown that Progressive had a substantial share of the market in certain instruments retailing for over $300, that would not necessarily lead to the conclusion that Progressive had attempted to monopolize the *relevant* market. (See Supplemental Transcript, Vol. VII, pp. 182-83). If instruments selling for $250 were interchangeable and competitive with those selling for over $300, one would have to know Progressive's share of the $250 market in order to determine whether Progressive had a market position such that it would restrain competition.

Second, even assuming that plaintiffs did show a product market, they failed to prove that Progressive had a controlling position in that market. In fact, plaintiffs' own expert, Mr. Scott Lloyd, testified that the information submitted in this case did not show Progressive's percentage share of the market. Without this, the court is unable to make any finding as to the dangerous probability that Progressive could monopolize the market. Under *Bonne Bell,* such a finding is a prerequisite to a successful claim. Plaintiffs have failed in their burden of proof on this issue, and the section II [sic] attempt and monopolization claims should be dismissed.

Furthermore, the real situation demonstrated by the evidence is that the market has been quite open for competition. Plaintiffs' sales have increased substantially since Olsen turned his efforts from part-time to full-time in 1974. Olsen has achieved a relatively high proportion of Progressive's sales, around 70% according to the evidence. The court has interpreted the over-all import of the evidence to show a high cross-elasticity of demand in the market and a high level of price consciousness. These factors indicate not only that Progressive has not been able to dominate the market, even if it tried, but also indicate that plaintiffs have a serious problem showing damage. Actually, they have done better in the market without

certain products on which Progressive had exclusive franchises than they did after obtaining the right to sell some of them. In short, the market was not as product conscious as plaintiffs' claims would indicate, but was very price conscious. This allowed plaintiffs to more effectively enter the market. Any higher prices charged by Progressive only facilitated plaintiffs' entry into the market, as shown by the evidence in this case. Therefore, the section 2 attempt and monopolization claims are dismissed.

2. Conspiracy to Monopolize

Plaintiffs also claim a combination or conspiracy to monopolize under section 2 which they claim needs no proof of dangerous probability or relevant market. (See plaintiffs' Memorandum of July 25, 1979, at 76-78). The offenses involved in section 2 of monopolization, attempt to monopolize, and conspiracy to monopolize are separate offenses requiring different proofs. *See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 709 (1962). While an attempt case requires conduct imminently threatening the establishment of a monopoly, only the act of conspiracy with specific intent to monopolize is needed in a conspiracy case. *Bowen v. New York News, Inc.*, 366 F. Supp. 651, 676 (S.D.N.Y. 1973), *modified on other grounds*, 522 F.2d 1242 (2d Cir. 1975). Thus, there is no necessity to completely consider monopoly power or market power in a relevant market in a section 2 conspiracy case. The more relevant inquiry is whether or not there has been a conspiracy or combination with specific intent to monopolize a substantial part of trade or commerce. *See American Tobacco Co. v. United States*, 328 U.S. 781, 789 (1946). For a section 2 conspiracy, it is enough if "some appreciable part of interstate commerce" is involved. *United States v. Yellow Cab Co.*, 332 U.S. 218, 225 (1947).

Summarizing, in order to show a conspiracy, a plaintiff must show 1) a specific intent to monopolize; 2) the existence of a combination or conspiracy; 3) overt acts done in further-

ance of the conspiracy; and 4) an effect upon a substantial amount of interstate commerce. *See, e.g., Cullum Elec. & Mechanical v. Mechanical Contractors,* 436 F. Supp. 418 (D.S.C. 1976), *aff'd, 569 F.2d 821 (4th Cir. 1978).* The most crucial element of section 2 conspiracy [sic], as evidenced by the emphasis placed upon it by the courts, is the specific intent to monopolize. *See, e.g., Carlo C. Gelardi Corp. v. Miller Brew. Co.,* 421 F. Supp. 237, 244-45 (D. N.J. 1976) and cases cited thereat. However, even though specific intent and not monopoly power in a relevant market is the essential element, the question of whether such specific intent existed in a particular case may be substantially assisted by consideration of factors similar to those necessary in the determination of monopoly power in a relevant market. Such factors help identify monopoly and hence agreement to monopolize. For example, the likelihood of success of the conspiracy is certainly some evidence on the question of whether or not such specific intent to monopolize existed. *Hudson Val. Asbestos Corp. v. Tougher H. & P. Co., Inc.,* 510 F.2d 1140, 1144 (2d Cir. 1975).

Thus, the requisite specific intent to monopolize to prove a section 2 conspiracy claim frequently involves, to a certain extent, the concepts of monopoly with a particular product or products and a certain market. Evidence of the same may assist in providing proof of the necessary specific intent to monopolize. As stated in *Joe Westbrook, Inc. v. Chrysler Corp.,* 419 F. Supp. 824, 845 (N.D. Ga. 1976):

> . . . [T]he watchword of Section 2 is monopoly, and the basic element of the offense of monopolization is the possession of monopoly power—that is, ability to control prices in and exclude competitors from the relevant market. Although a Section 2 conspiracy may exist despite the lack of the necessary monopoly power to actually succeed in monopolizing a relevant market, the requisite intent to monopolize must be present, and that, by definition, involves a relevant market. Defendants cannot be held liable under the Sherman Act for intending to do something which is perfectly lawful. For example, if X and Y

conspire to exclude competitors from the market for ABC goods, ABC goods constituting a relevent product market, then the fact that X and Y do not have the requisite monopoly power is not a defense inasmuch as what they conspire and intend to do is unlawful. However, if X and Y conspire to exclude competitors from the market for ABC goods, and X and Y contend that ABC goods do not constitute a relevant market and in fact they do not constitute a relevant product market, then X and Y have not intended to monopolize in violation of Section 2 inasmuch as what they conspire and intend to do is not unlawful. In short, an element of conspiracy is the specific intent to monopolize; monopolization involves the exclusion of competitors from the relevant product market; the defendants are presumed to know the law, that is, that a relevant product market is an essential element of the offense of monopolization; by claiming that there is no relevant product market defendants assert that they did not have the specific intent to monopolize, a necessary element of conspiracy.

The court acknowledges that the extent to which relevant market factors should enter into the specific intent element is the subject of controversy. For example, some courts have indicated that the relevent market itself is an element of a *vertical* conspiracy under section 2, as well as of attempt to monopolize and monopolization. *American Football League v. National Football League,* 323 F.2d 124 (4th Cir. 1963); *United States v. Johns-Manville Corp.,* 231 F. Supp. 690 (E.D. Pa. 1964). Though the rule may be somewhat different in a horizontal conspiracy, *United States v. Consolidated Laundries Corp.,* 291 F.2d 563, 573 (2d Cir. 1961), this rule stems from the language in *Yellow Cab, supra.* The Tenth Circuit has explicitly adopted the "appreciable part of interstate commerce" test of *Yellow Cab. Bryan v. Stillwater Bd. of Realtors,* 578 F.2d 1319 (10th Cir. 1977); *Salco Corp. v. General Motors Corp., Buick Motor Div.,* 517 F.2d 567 (10th Cir. 1975).

The court believes that the Tenth Circuit would not require a substantial showing of relevant market in a section 2 con-

spiracy case in view of its language in *Bryan* and *Salco*. However, the court believes that the "some appreciable part of interstate commerce" test has not been met in this case with regard to the remaining defendant, Progressive. The only evidence of any concerted activity from which to show a conspiracy under section 2 is that mentioned previously in the portion of this order dealing with section 1 violations involving Progressive, Herger and/or CBS. The only "part" of commerce which could conceivably be affected by such activity is the CBS Fender line. As previously indicated, Progressive already had a "monopoly" of that line in that it was an exclusive dealer of that line under an arrangement which the court has previously found was not *per se* illegal under section 1 but should be viewed under the rule of reason. That rule of reason analysis would require a complete examination of the entire market structure.

The evidence indicates that Progressive held exclusive franchises on certain product lines and may have prevented others from obtaining business on those lines. The record does not show that this was done for the purpose of obtaining a complete monopoly in the product types. In fact, the record merely shows that although Progressive sought to be the exclusive sales and service entity for certain product lines, the market, as a whole, was still quite competitive. Plaintiffs' successful experience in selling in the market with various other lines, after changing Olsen's business, as mentioned earlier herein, indicates the high competitive nature of the market. More importantly, plaintiffs' experience in successfully entering the market shows quite clearly the absence of any likelihood of success of any effort to monopolize and weighs heavily against any finding of specific intent. *Hudson Val. Asbestos, supra,* 510 F.2d at 1144; *Carlo C. Gelardi Corp., supra,* 421 F. Supp. at 245. Accordingly, the court finds that plaintiffs have not shown that Progressive had a specific intent to monopolize any appreciable part of the market. Therefore, the section 2 claims are dismissed.

III. CONCLUSION

All of plaintiffs' section 2 claims are dismissed while plaintiffs' section 1 claims against Progressive involving Herger and/or CBS survive, though the issue of damages has not been addressed. While there currently is some evidence of damage on the section 1 claims, the extent of it and the propriety of considering certain exhibits which lend support to the damage claimed by plaintiffs appear to be disputed. A claim is made that some exhibits which have been used in argument have not been received. Also, there is other evidence with respect to damages which under the arguments made the court cannot correlate to the claims that remain. Due to the uncertainty surrounding damages, the court is unable to presently make a ruling on the motion to dismiss on this aspect of the case on the remaining claims. For these reasons, the arguments with respect to damages have not been considered dispositive on the motion at this time. The court sees no reason to grant plaintiffs' apparent motion to amend the complaint to conform to the evidence, made in Plaintiffs' Brief in Opposition to Defendants' Rule 41(b) Motion at page 41, because all the evidence has been considered in determining the validity of all of plaintiffs' claims. The motion to amend the pleadings is therefore denied. The case will be set for continuation of the trial for the presentation of any evidence that the remaining defendant may have on the section 1 claims, for proper rebuttal and final argument, including clarification of the evidentiary problems on damages.

IT IS SO ORDERED.

DATED this 22 day of May, 1980.

ALDON J. ANDERSON
United States District Judge

APPENDIX B

STATUTES AND RULES RELEVANT TO BRIEF IN OPPOSITION AND MOTION FOR DAMAGES

1. Sherman Antitrust Act §1, 15 U.S.C. §1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court.

2. Federal Rule of Civil Procedure 41(b):

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

3. Federal Rule of Civil Procedure 52(a):

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of this action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

4. Supreme Court Rule 17.1:

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

5. Supreme Court Rule 49.2:

When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, hereby certifies that three true and correct copies of the above and foregoing Brief of Respondent Peavey Electronics Corporation in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and Brief in Support of Motion of Respondent Peavey Electronics Corporation for Damages pursuant to Supreme Court Rule 49.2 have been forwarded by certified mail, return receipt requested, to Lowell V. Summerhays, Summerhays, Runyan and McClelland, 420 Continental Bank Building, Salt Lake City, Utah 84101; Stephen G. Crockett, Rooker, Larsen, Kimball & Parr, 185 South State Street, Suite 1300, Salt Lake City, Utah 84111; and Bryce E. Roe, Roe & Fowler, 340 East 4th South, Salt Lake City, Utah 84111; on this 15th day of July, 1983.

Original Signed by
Curtis L. Frisbie, Jr.

Curtis L. Frisbie, Jr.

NO. 82-2077

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah Corporation,

Petitioners,

vs.

PROGRESSIVE MUSIC SUPPLY, INC., NORLIN MUSIC, INC., formerly CHICAGO MUSICAL INSTRUMENTS, and PEAVEY ELECTRONICS CORPORATION,

Respondents.

MOTION OF RESPONDENT PEAVEY ELECTRONICS CORPORATION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 49.2

Peavey Electronics Corporation, one of the respondents to the petition of Clair Olsen and Guitar City Studios, Inc., for writ of certiorari, respectfully moves the Court to award Peavey Electronics Corporation reasonable damages for the costs incurred by reason of the commencement and pendency of this frivolous proceeding, in the event that the petition for writ of certiorari is denied.

The ground for this motion is that the petition is filed herein without any basis or reason for granting the same, as is more fully shown in this respondent's brief in opposition to such petition. The Court may award damages to the respondent to a frivolous petition for writ of certiorari pursuant to Supreme Court Rule 49.2.

A reasonable sum for such damages incurred in responding to this frivolous petition is $5,500.00. The foregoing sum represents the total of $4,000.00 in attorneys' fees and $1,500.00 in printing costs and other miscellaneous costs.

Dated: July 13, 1983.

Respectfully submitted,

GARDERE & WYNNE

By Curtis L. Frisbie, Jr.
Curtis L. Frisbie, Jr.
Counsel of Record

1500 Diamond Shamrock Tower
Dallas, Texas 75201
214/748-7211

ATTORNEYS FOR RESPONDENT
PEAVEY ELECTRONICS CORPORATION

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, hereby certifies that three true and correct copies of the above and foregoing Motion of Respondent Peavey Electronics Corporation for Damages Pursuant to Supreme Court Rule 49.2 have been forwarded by certified mail, return receipt requested, to Lowell V. Summerhays, Summerhays, Runyan and McClelland, 420 Continental Bank Building, Salt Lake City, Utah 84101; Stephen G. Crockett, Rooker, Larsen, Kimball & Parr, 185 South State Street, Suite 1300, Salt Lake City, Utah 84111; and Bryce E. Roe, Roe & Fowler, 340 East 4th South, Salt Lake City, Utah 84111; on this 15th day of July, 1983.

Curtis L. Frisbie, Jr.
Curtis L. Frisbie, Jr.

No. 82-2077

In the Supreme Court of the United States

OCTOBER TERM, 1982

CLAIR OLSEN and GUITAR CITY STUDIOS, INC.,
a Utah corporation,
Petitioners,

vs.

PROGRESSIVE MUSIC SUPPLY, INC., NORLIN MUSIC, INC.,
formerly CHICAGO MUSICAL INSTRUMENTS, and
PEAVEY ELECTRONICS CORPORATION,
Respondents.

PETITIONERS' REPLY BRIEF TO THE BRIEF OF RESPONDENT PEAVEY ELECTRONICS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

and

BRIEF IN SUPPORT OF MOTION OF RESPONDENT PEAVEY ELECTRONICS CORPORATION FOR DAMAGES PURSUANT TO SUPREME COURT RULE

LOWELL V. SUMMERHAYS
EDWARD T. WELLS
Counsel of Record

W. ANDREW CLAWSON
SUMMERHAYS, WELLS
& CLAWSON

420 Continental Bank Bldg.
Salt Lake City, Utah 84101

Attorneys for Petitioners

QUESTIONS PRESENTED

I.

Will this court allow the dismissal of Respondent Peavey when that dismissal would be in conflict with and a departure from current standards of antitrust law as articulated by this court and other circuit courts?

II.

Will this court award damages to an antitrust defendant who was associated with a proven per se illegal violation of the antitrust laws, after defendant refused to make himself available as a witness at trial and failed to offer any evidence of a pro competitive purpose?

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SUMMARY OF THE ARGUMENT

The argument is set forth in two points. Point I shows that Peavey and Progressive had an exclusive dealing agreement in Utah. That agreement was parallel to and coexistent with a per se illegal conspiracy. That agreement was in a relevant product market and was an exception to Peavey's normal distribution policy. That agreement produced exactly the same market effect which was found to be per se illegal between CBS and Progressive. In the face of this anticompetitive market effect Peavey refused to make itself available as a witness during Plaintiffs case and offered no evidence of a pro competitive purpose. The dismissal of Peavey under these circumstances without examination for economic harm is in conflict with this Courts holdings as to per se and the rule of reason standards of antitrust law. Point II shows that Peavey's motion for damages under this Courts Rule 49.2 is without merit and does not meet the legal requirements to impose such sanctions.

ARGUMENT

POINT I

THE REQUIREMENTS OF THIS COURT'S RULE 17 ARE SATISFIED AS TO DEFENDANT PEAVEY REMAINING IN THE CASE.

A. *Peavey and Progressive by agreement created an exclusionary anticompetitive price fixing combination in the state of Utah thereby per se violating the antitrust laws.*

Progressive and Peavey fixed prices in an exclusionary anti-competitive agreement. This was accomplished by Peavey granting Progressive an exclusive dealing

arrangement in the state of Utah, then withholding national advertizing of Peavey's low suggested list prices by agreement with Progressive so that Progressive could fix prices and sell Peavey's products without competition at prices substantially above Peavey's suggested list prices. Prior to this agreement, Peavey's normal business practice was to advertise its low suggested list prices to gain market entrance. *See* TT April 30, 1979, page 59, lines 22-25, and p. 60, lines 1 and 2, (undisputed testimony of Michael Draper, former employee of Progressive Music). The trial court misquoted this testimony in its dismissal of Peavey. *See* Peavey Brief at page 8a. The courts interpreted Draper's testimony to mean the withholding of advertising to be a single exception in a single trade magazine, while his testimony establishes a continuing practice in *any trade magazine*. *See* Appendix A attached, pages 59 to 63, TT April 30, 1979. Of critical importance is the fact that the trial court did not have a copy of the April 30, 1979 Trial Transcript to review prior to dismissing Peavey. This is verified by the case docketing sheet. Also six other volumes of the trial transcripts containing Petitioner's expert economic testimony were not before the Trial Court during the decision making process. That issue was raised on appeal and dismissed. Appellants' 10th Circuit Brief at p. 61.

The agreement between Progressive and Peavey was an exception to Peavey's normal distribution system. See Appendix A page 62, line 14-25, and page 63, lines 1-5.

Peavey argues that Petitioners' cited case *Com-Tel v. Dukane Corp.*, 629 F. 2d 404 (6th Cir. 1982) does not apply since Olsen was not singled out. Peavey refused to deal with anyone in Utah except Progressive to protect the price fix. Respondents misread *Com-Tel*. *See*

notes [1-2] at page 409. The court cites from *GTE Sylvania*, where the stifling of competition at the horizontal level when applied vertically invokes the per se illegal rule. Therefore, the stifling of intrabrand competition in the state of Utah caused by Peavey's refusal to deal to protect Progressive's price fix is a per se violation of the antitrust laws. The failure of the lower courts to apply the per se rule is in conflict with this courts holdings in *U.S. v. Socony Vacuum Oil Co.*, 310 U.S. 150 at 221, 223:

> A combination formed for the purpose and with *the effect of raising, depressing, fixing, pegging, or stabilizing the prices* of a commodity in interstate or foreign commerce is illegal per se. Emphasis added.

The dismissal of Peavey is also in conflict with other holdings that the withholding of advertising to allow price fixing is an antitrust violation. *See Schnapps Shop v. H. W. Wright Ltd.*, 377 F. Supp. 570, at p. 581 (D. My. 1973).

B. *The dismissal of Peavey by the lower courts is in conflict with this courts holdings under current Rule of Reason standards.*

The dismissal of Peavey without requiring any evidence of a pro-competitive purpose after an anti-competitive effect was proven in a relevant product market and after Peavey refused to make itself available as a witness is in conflict with and inconsistent with this Court's holding in *Continental TV v. GTE Sylvania*, 433 U.S. 36, 97 S. Ct. 2549, 2554 (1977), n. 15 citing Justice Brandies in *Chicago Board of Trade. See GTE* at p. 2556, n. 14 citing *Schwinn*, 389 U.S. at 379. Clearly it is the burden of the Defendant to prove a pro-com-

petitive purpose after an anti-competitive effect has been proved by the plaintiff.

Peavey argues that it is entitled to dismissal under the *GTE* Rule of reason because it was a new market entrant and was unable to compete. Peavey Brief at p. 10. The lower court accepted that argument. Peavey Brief at pages 9a and 10a. The undisputed domonstrable economic evidence is to the contrary of Peavey's argument and the court's findings. *See* Appendix B, Trial Exhibit 217b attached as Appendix B, (Peavey was Progressive's largest supplier.). This fact is significant because Peavey not only competed but surpassed the sales of the number one leader in the trade, CBS Musical Instruments. CBS was the leading product in the trade during the relevant period. Trial Exh. P-158. Peavey argues it was really unable to compete on the open market. The court so found, without having seven (7) volumes of the trial transcripts, three of which were the critical testimony of Plaintiffs' economic expert. Revealing the lower court failed to consider how Peavey could become the sales leader in Utah under a price fixing agreement.

C. *Peavey is a co-conspirator in the per se illegal boycott proved in the lower courts and the refusal of Peavey to testify infers favorable inference for the Plaintiffs that were never made.*

Peavey asserts Olsen did not prove a group boycott. This agreement is incorrect because the petitioners demonstrated the boycott existed. *See* Petition for Certiorari, Appendix A, at p. 13a. Olsen's theory of group boycott is based on *Klors v. Broadway Hales Stores*, 359 U.S. 207 (1959). The petitioners specifically claim a *Wedge Shaped* conspiracy where an oligopolist at the

horizontal competitive level causes a vertical refusal to deal to prevent price competition. *See* 68 Yale Law Journal at 949. In support of that theory, substantial evidence was submitted at trial proving Peavey to be a co-conspirator. Progressive was the state's largest or an oligopoly dealer. Trial Exh. P-103. Petitioners' economic expert, after studying the market, testified that Progressive had cornered the best lines in the trade to cartel extremes. TT May 23, 1979, pp 18-22. All of the defendant manufacturers dealing arrangements in Utah were illogical and could be expected to produce anti-competitive effects. TT May 29, 1979, PP 111-114. Defendants produced no economic expert to dispute this testimony and, as verified by the docketing sheets, the trial judge did not have this testimony before him to review prior to dismissing Peavey. Michael Draper testified that it was the business policy of Progressive to be protected from price competition. TT April 30, 1979, page 22, lines 13-17. Testimony also stated Progressive, as the state's largest dealer, would threaten manufacturers with the loss of Progressive's business if they dealt with Olsen. TT April 30, 1979, page 71, lines 11-16 and TT Vol. 1, page 2. The dismissal of Peavey in the face of such strong undisputed evidence is in conflict with this Court's long standing and consistent interpretations of the antitrust laws. *See GTE Sylvania supra* 433 U.S. at 49 citing *Standard Oil.* The dismissal of Peavey is also in conflict with other Circuit's interpretations of the Federal Rules. *See* Moore's Federal Practice, page 41-192 n. 9 & 10 citing *Riegal Riber v. Anderson Gin Company*, 512 F. 2d 784 (5th Cir. 1975) as the leading case.

Petitioners' evidence against Peavey is stronger than the *Klors case supra.* In this case, Peavey joined the group boycott by refusing to deal with Olsen while at

the same time allowing Progressive to sell Peavey products under Olsen's trade name. It is undisputed that Progressive infringed and advertised Olsen's trade name in furtherance of the proven per se illegal conspiracy. It is also undisputed that the 10th Circuit Court dismissed the infringement and other unfair competition issues in silence, disregarding Fed. R. Civ. P. 52(a) & 8 (e)(2), Federal Statutes 15 U.S.C. 1125(a) & 28 U.S.C. 1338(b) and this Court's mandate in *Hurn Oursler*, 289 U.S. 238 (1932). *See* Petition for Cert. POINT II. In spite of this travesty of justice and the failure of the trial court to have in its possession for review seven (7) volumes of the trial transcripts, which included all of the critical expert economic evidence and the undisputed testimony of Michael Draper showing Peavey's involvement in the price fixing conspiracy, Peavey asks this Court to rely on the lower court decision as being accurate and without error.

Peavey further argues that Olsen is not entitled to any favorable inferences under this Court's holdings in *Continental Ore v. Union Carbide & Carbon Corp.*, 370 U. S. 609 (1962) and that the dismissal of Peavey under a Fed. R. Civ. P. 41(b) motion did not dismember the conspiracy under that same standard. Petitioners believe that Peavey's assertions are in conflict with *Continental Ore supra*, but also are specifically in conflict with this Court's holdings as to Rule 41(b) dismissals and antitrust law. *See* Moores *supra* at page 41-184, n. 7, citing *U.S. v. Gypsum Co.*, 333 U.S. 364 (1946) where the Court reversed a Rule 41(b) dismissal when a violation of the Serman Act was apparent. It is also clear in Moores *supra* that Rule 41(b) dismissls are not to be made if Plaintiff's evidence shows a right to relief. *See* Moores at page 41-173, n. 5. Clearly Petitioners meet this Court's standard to reverse the

Rule 41(b) dismissal because 1) The Trial Court erroneously failed to consider the statutory right of relief on the issues of unfair competition as they related to the proven conspiracy, 2) The Trial Court failed to review or consider the expert economic testimony during the decision making process, 3) The Trial Court failed to consider or review undisputed testimony of Peavey's involvement in the price fixing. See Appendix A and B) Trial Exhibit P-217(b) requires that Peavey's exclusive dealing with Progressive be examined for economic harm where an anti-competitive effect was proven in a relevant product market.

Clearly the Petitioners have met their burden of providing that small amount of additional proof required to join a defendant to a proven conspiracy under the standards of *U.S. v. Cadillac Overall Supply*, 568 F. 2d 1078 (5th Cir. 1978, the 10th Circuit's similar holdings in *Morton Salt v. Royal Crystal Salt*, 235 F. 2d 573 (1956) and this Court's holdings in *U. S. Gypsum, supra.*

The lower courts failed to make other favorable inferences for petitioners which should have been made under antitrust law holdings by this court. *See U.S. v. Interstate Circuit*, 306 U.S. 206 at 226, where the failure to testify infers favorable inferences. The lower courts' dismissal of Peavey when it refused to testify is in conflict with this Court's holdings in *Interstate Circuit.* The failure of the lower courts to review Petitioners' expert economic testimony and the contemporaneous documents demonstrating the economic effect is in conflict with this Court's holdings. *U.S. v. U.S. Gypsum*, 333 U.S. 364 (1946) at n. 7-9. *Gypsum* makes it clear that contemporaneous documents take preference over the testimony which is conflicting, and the

demonstrable economic effect proven by petitioners requires, as a very minimum standard, that Peavey remain in the case to prove its pro-competitive purpose. *GTE Sylvania supra*, 433 U.S. at 59.

D. *Dismissal of Petitioners' relevant product market by the lower courts is in conflict with this court's holdings in Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 376 (1927).*

Peavey unethically and incorrectly argues that Olsen raises a new relevant product market for the first time on appeal. Peavey Brief at p. 12. Olsen's relevant product market has consistently been professional musical instruments in the frets, electronics, and percussion field (hereinafter FEP instruments). FEP instruments are recognized in the trade as a separate and distinct market. Trial Exhibit P-209. Peavey wrongly asserts Olsen's product market is vague and unproven. A complete detailed breakdown of the FEP as professional rather than amateur is set forth in PLAINTIFFS' MEMORANDUM IN OPPOSITION TO PROGRESSIVE MUSIC SUPPLY, INC.'S MOTION FOR SUMMARY JUDGMENT, 20 July 1977, at POINT II, A, 2. The distinction that the instruments are professional rather than amateur, is set forth in PLAINTIFFS' MEMORANDUM *supra* at POINT II, A, 2(e). The dismissal of Plaintiffs' relevant product market as professional instruments is in conflict with this Court's holding in *Kodak*.

Under the line of cases cited by Peavey, Petitioners have proven an anti-competitive effect in a relevant product market. Peavey is required under that standard to prove if possible a pro-competitive purpose.

POINT II

RESPONDENT PEAVEY'S USE OF SUPREME COURT RULE 49.2 TO CLAIM DAMAGES IS WITHOUT MERIT.

Peavey cites very current Supreme Court cases in support of their claim for damages. Peavey petition at page 16-17. A correct citing to find these cases is 51 U.S.L.W. 6-14-83 at 3883. These cases are distinguishable from our case where they failed to pay filing fees or to submit a proper petition under this Court's Rule 33, causing delay and in attempting to proceed in forma pauperis. No such issues exist in our case.

Peavey also cites *N.L.R.B. v. Catalina Yachts*, (679 F. 2d 180, 182 9th Cir. 1982), see n. 5, which defines when a case is frivolous showing:

An appeal is frivolous when the outcome is obvious. This case does not meet the standard for frivolity because the outcome is not obvious. The best evidence the court could have of this is the fact that not one of the defendants, including Peavey, has raised any argument to defend, oppose or even dispute Petitioners' statutory due process argument. By failing to deny these arguments, the defendants have placed themselves in a position of agreement that Petitioners have been denied due process.

The application of this Court's Rule 49 for damages is found in 13 Moores Federal Practice, Rule 49, page SC49-6:

> The imposition of such sanctions however is *highly unusual and requires a clear showing of bad faith.*

Emphasis added. Moores cites *State of West Virginia v. Chas Phizer & Co.*, 440 F. 2d 1079 (2d Cir. 1971) as the leading case. No clear showing of bad faith has been shown, proved or even alleged in our case. It would be uniquely original to impose sanctions for an attempt to obtain Constitutional due process at the Supreme Court. Such a precedent would defeat and be a deterrent to the purpose entrusted by Congress to the private litigant and be in conflict with this Court's holding in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965).

CONCLUSION

For all of the foregoing Peavey should remain in the case and its motion for damages should be denied. For brevity, authorities which have been reproduced in previously submitted briefs are not reproduced herein.

Respectfully submitted,

By ....
Lowell V. Summerhay

SUMMERHAYS, WELLS & CLAWSON

By ....
Edward T. Wells

By ....
W. Andrew Clawson

Attorneys for Petitioner

APPENDIX A

(Emphasis by Petitioners)

commissions from Guild?

MR. CROCKETT: Objection. That is leading.

MR. SUMMERHAYS: That is what he said.

THE COURT: You may answer.

THE WITNESS: Yes. Don told me that he had called the President of Guild and had Chuck's commissions lifted from all Progresive's sales of Guild.

BY MR. SUMMERHAYS:

Q Did you ever have a conversation with Mr. Don Penman in 1974 about a Peavey price list?

A Yes.

Q Where did that conversation occur?

A Music Wholesale?

Q And who was present?

A Don Penman and myself.

Q Do you remember approximately what time in the year?

A No, I don't.

Q What was said, and by whom on that occasion?

A Don Penman said to Hartley Peavey—

Q This is what Don Penman is telling you that he told Hartley Peavey?

A *Yes, Hartley wouldn't publicize prices in any trade magazine and Hartley published a list price so Don told me he called Hartley and reminded Hartley that he said he wouldn't publish a list price and Hartley—Don told me*

that Hartley said that he would not publish the list again. And subsequently, the next month it wasn't in the magazine.

Q Do you know why he did that?

MR. CROCKET: Objection, no foundation.

THE WITNESS: No.

MR. SUMMERHAYS: Well, wait a minute, wait until the judge rules.

THE COURT: The answer may stand.

BY MR. SUMMERHAYS:

Q I'm sorry. Your answer was no?

A No.

Q Did Don say anything about that on that occasion?

A Yes.

Q What did he say?

A *Don told me that he had asked Hartley years back not to publish any list prices because the retailers could get more for the product. It cost them so much money to bring the product in and to inventory the product in larger quantities so that they need more room to carry that kind of inventory.*

Q How much —

THE COURT: Just a minute. Would you repeat again what he told you that has been said on the conversation on the phone he had with Peavey?

THE WITNESS: What was that again?

MR. SUMMERHAYS: Repeat what you said about what Mr. Penman told you that he had said in a conversation with Mr. Peavey on the phone. In other words, repeat what you have said about this episode.

THE WITNESS: *Don said that he had talked to Hartley on the phone about the magazine article with the publicized price. He had called Hartley and reminded Hartley because Hartley had said earlier that he would not publicize a list price and Don reminded Hartley of that fact.*

BY MR. SUMMERHAYS:

Q Now, do you know what he was referring to when he said Hartley published a list price? Was that—

A Suggested list price.

Q Was that Penman's suggested list price that he had you print that he was talking about?

A I don't know if I understood the question.

Q Well, which list price was Mr. Penman talking about to Mr. Peavey?

A Mr. Peavey's price list.

Q Now, what did he say about the list price?

A What did Don say about the list price?

Q Yes.

A Don just asked Hartley not to publish the list price because out here in Utah—if I remember his exact words, out here in Utah because of freight, and because of

larger inventories and inventory expenses that he needed to get more retail money out of the product because of costs.

Q Did you have any experience as a salesman with the general public on that point?

A Yes.

Q What was that experience? I just want a summary of the experience, not any particular conversation.

MR. CROCKETT: Your Honor, I think he is calling for a narrative answer, and I'm not even sure what he is asking by the question. Experience with the public. It is overly broad and ambiguous at least.

THE COURT: It appears to be.

BY MR. SUMMERHAYS:

Q In your sales of Peavey instruments, what experience, if any, did you make or have or observe in trying to sell the Peavey instruments at Penman's list price rather than Peavey's list price?

MR. CROCKETT: I don't understand, Your Honor, I have the same objection. He is asking what the public told him. It is hearsay.

MR. SUMMERHAYS: No, it is not, Your Honor. It is a commercial activity which he is entitled to relate in the summary of the impact of his business experience.

THE COURT: He may answer.

THE WITNESS: *Progressive's list price was higher*

than other states' list prices. I had the occasion while I worked at Progressive, and I had the occasion while I worked at Music Wholesale going to other states and seeing that the list price in other states was lower than the list price in Utah.

BY MR. SUMMERHAYS:

Q Do you have any other experience in that regard with customers?

A No.

Q Are you currently selling musical instruments to Progressive Music from Pacific Musics?

A No.

Q Are you selling them to a wholesale music supplier?

A No.

Q Are you selling any items to any entity that Don Penman owns?

A Occasionally.

Q Do you sell any items to Mr. Olsen or any corporation that he owns?

A Yes.

Q Do you sell them in large quantities?

A No.

Q How much, to your knowledge, in dollar value, if you can recall, did you sell to him last year?

MR. SAVAGE: Olsen?

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ANALYSIS OF THE WHOLESALE VALUE OF PURCHASES BY PROGRESSIVE MUSIC OF ELECTRIC GUITARS,[1] ACOUSTIC GUITARS, AMPLIFIERS (DEFINITION B),[3] AND SYNTHESIZERS 1971-1975

(Prepared June 8, 1979)

Manufacturer	1971 (Dollars) (1)	Percent Of Total (Percent) (2)	1972 (Dollars) (3)	Percent Of Total (Percent) (4)	1973[2] (Dollars) (5)	Percent Of Total (Percent) (6)	1974 (Dollars) (7)	Percent Of Total (Percent) (8)	1975 (Dollars) (9)	Percent Of Total (Percent) (10)	Total (Dollars) (11)	Percent Of Total (Percent) (12)
Peavey	$23,246.75	25.71%	$ 64,519.79	42.18%	$ 91,596.75	43.02%	$ 57,412.75	28.27%	$ 34,171.25	21.66%	$270,947.29	33.16%
CBS	39,926.15	44.15	30,416.50	19.88	29,262.50	13.74	27,900.25	13.74	24,168.50	15.32	151,673.90	18.56
Norlin	9,999.90	11.06	14,306.83	9.35	26,082.09	12.25	37,010.82	18.22	21,719.92	13.77	109,119.56	13.35
C. F. Martin	7,377.50	8.16	12,750.00	8.33	15,277.50	7.18	36,100.00	17.78	8,575.00	5.43	80,080.00	9.80
Acoustic	5,443.50	6.02	4,089.50	2.67	12,173.50	5.72	13,099.00	6.45	14,166.00	8.98	48,971.50	5.99
Guild	1,302.50	1.44	8,635.00	5.64	11,937.50	5.61	8,025.00	3.95	9,287.00	5.89	39,187.00	4.80
ARP	—	—	7,987.05	5.22	777.00	0.36	8,160.60	4.02	18,854.45	11.95	35,779.10	4.38
Ovation	976.50	1.08	3,974.95	2.60	3,171.50	1.49	10,195.50	5.02	10,955.00	6.94	29,273.45	3.58
Electro Music	—	—	2,116.26	1.38	10,144.40	4.76	—	—	—	—	12,260.66	1.50
Music Man	—	—	—	—	—	—	2,267.50	1.12	9,187.50	5.82	11,455.00	1.40
Gretsch	—	—	885.00	0.58	8,104.50	3.81	—	—	2,265.50	1.44	11,255.00	1.38
Corwin Vega	—	—	—	—	—	—	—	—	420.50	0.27	420.00	0.05
Shure	—	—	—	—	1,996.00	0.94	—	—	—	—	1,996.00	0.24
MSA	332.50	0.37	747.50	0.49	—	—	—	—	—	—	1,080.00	0.13
Beckman	—	—	—	—	—	—	1,110.00	0.55	2,249.40	1.43	3,359.40	0.41
Rickenbacker	—	—	—	—	1,397.50	0.66	1,810.00	0.89	294.00	0.19	3,501.50	0.43
Altec	—	—	325.00	0.21	399.00	0.19	—	—	—	—	724.00	0.09
Merson	270.00	0.30	—	—	—	—	—	—	249.75	0.16	519.75	0.06
Ampeg	—	—	835.00	0.55	—	—	—	—	—	—	835.00	0.10
Apex	—	—	—	—	247.75	0.13	—	—	—	—	274.75	0.03
Plush	—	—	650.00	0.42	—	—	—	—	—	—	650.00	0.08
Sunn	647.56	0.72	—	—	—	—	—	—	—	—	647.56	0.08
Travis Bean	—	—	—	—	—	—	—	—	625.00	0.40	625.00	0.08
JED	605.00	0.67	—	—	—	—	—	—	—	—	605.00	0.07
Micro Instr.	297.50	0.33	—	—	—	—	—	—	—	—	297.50	0.04
Yamaha	—	—	370.00	0.24	330.00	0.15	—	—	—	—	700.00	0.09
Chesbro	—	—	372.00	0.24	—	—	—	—	—	—	372.00	0.05
Oberheim	—	—	—	—	—	—	—	—	594.00	0.38	594.00	0.07
TOTAL	$90.425.36	100.00%	$152,980.38	100.00%	$212,924.49	100.00%	$203,091.42	100.00%	$157,782.27	100.00%	$817.203.92	100.00%

Note: Percentage totals may not add due to rounding.

[1]Only includes electric guitars, acoustic guitars and amplifiers with a wholesale cost of over $150 per unit and synthesizers with a wholesale cost of over $500/unit.

[2]Following the May 29, 1979 court appearance, the file of 1973 synthesizer invoices could not be found. Figures for 1973 synthesizers for this analysis were taken from the worksheet of the previous analysis. The prior worksheets set forth synthesizer purchases of $1,600 by Norlin and $777 by ARP.

[3]Includes all pure amplifiers plus units which are sold as a package of components including amplifiers and separate speakers.

Source: Purchase invoices provided by Progressive Music.

CERTIFICATE OF SERVICE

The undersigned a member of the bar of the United States Supreme Court, hereby certifies that three true and correct copies of the above and foregoing Reply Brief of Petitioners Clair Olsen and Guitar City Studios, Inc. in Reply to Respondent Peavey Electronics Brief in opposition to Petitioners Petition for Certiorari have been either personally delivered or placed postage prepaid, first class in the United States Mail, to the following:

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DATED this .... day of August, 1983.

By ....
Lowell V. Summerhay

SUMMERHAYS, WELLS &
CLAWSON

By ....
Edward T. Wells

By ....
W. Andrew Clawson